



*Scenes from the Kuala Lumpur War Crimes Tribunal Hearing
from 7 - 11 May 2012*

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CHIEF PROSECUTOR OF THE KUALA LUMPUR WAR CRIMES
COMMISSION v. GEORGE WALKER BUSH *et al.*

KLWCT Report 2012

KUALA LUMPUR WAR CRIMES TRIBUNAL

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS
(INCLUDING NOTES OF PROCEEDINGS)

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Kuala Lumpur Foundation To

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JUDGMENT

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- 1.9 In paragraph 13 it is stated that the legal opinions mentioned in paragraph 8 were relied upon by the first three named Accused Persons and then translated into memos and directives which they issued to persons in charge of dealing with detainees at prisons run by, or under the supervision of US and its officials. 1
5
- 1.10 In paragraph 14 of the particulars of the charge, it is stated that as a result and on the basis of these authorizations by the first to the third Accused Persons relying upon the legal opinions of the 4th to the 8th Accused Persons, war crimes (that is, acts of torture and brutal, barbaric, cruel and dehumanizing acts) were perpetrated against, amongst others, the following named victims (detainees) – 10
15
- (a) Moazzam Begg of the United Kingdom (detained from January 2002 to January 2005);
 - (b) Rhuheel Ahmad of the United Kingdom (detained from end of 2001 to March 2004), 20
 - (c) Ali Sh. Abbas of Iraq (detained from October 2003 to March 2004); 25
 - (d) Abbas Abid of Iraq (detained from August 2005 until September 2006);
 - (e) Jameelah Abbas of Iraq (detained from January 2004 to June 2004). 30
- 1.11 In paragraph 15, it is stated that the detainees were subjected to a systematic pattern of abuse in the execution of these acts of torture in various detention centres. In paragraph 16, it is stated that the detainees were subjected to severe physical and mental pain, and cruel, inhuman and degrading treatment over long periods. These acts of torture etc. were designed to force the above detainees to confess to "crimes" they had no knowledge of, and / or were not involved in. 35
40

1 1.12 In paragraphs 18 and 19 of the charge, it is stated that
these acts of torture are in contravention of the Universal
Declaration of Human Rights and the Convention
5 Against Torture 1984. These acts also constitute cruel,
inhuman and degrading treatment in contravention of
Geneva Convention III of 1949 on the treatment of
combatants and civilians in any armed conflict and are
applicable to interrogations.

10 1.13 In paragraphs 20 and 21 of the charge it is stated that
the victims (detainees) were detained without just cause.
No due process of the law was applied. They were not
allowed access to justice including to legal counsel or
15 courts of law. They were not charged in a court of law
for any offence.

20 1.14 None of the 8 Accused persons was present at the trial
although all of them had been duly notified of the charge
against them in accordance with Chapter III Article 6(a)
of Part 2 of the Rules of Procedure and Evidence of the
Tribunal.

25 1.15 As provided for under Article 15 of Chapter V of the
Charter, all the Accused persons were represented by
Amicus Curiae.

2. Preliminary Objection

30 2.1 Before the prosecution began its opening statement, the
Amicus Curiae filed a preliminary objection to the
Tribunal's jurisdiction to hear this case against all the
Accused persons.

35 2.2 The substance of the preliminary objection was that the
Tribunal is a creature of a Malaysian statute and can
only hear cases which are governed by Malaysian law
or by treaties of which Malaysia is a signatory. The
crimes of which the Accused persons had been charged
40 are not found in any Malaysian Law nor subject of any
treaties of which Malaysia is a signatory.

- 2.3 In reply the prosecution submitted that the Kuala Lumpur War Crimes Tribunal is a tribunal of conscience exercising universal jurisdiction. Its jurisdiction to hear crimes against peace, war crimes and crimes against humanity are provided expressly in Article 7 of the Charter. 1
5
- 2.4 Article 4 of the Charter expressly states that the Tribunal has international legal personality and shall have such legal capacity as may be necessary for the exercise of their functions and the fulfilment of their purpose. 10
- 2.5 Having considered carefully arguments by both sides, the Tribunal ruled that it has jurisdiction to hear the charge against the Accused and dismissed the preliminary objection. 15

3. Prosecution's case

- 3.1 The prosecution made an opening statement indicating that he would call 3 witnesses who had formerly given testimony before the Kuala Lumpur War Crimes Commission and thereafter would submit statutory declarations of two witnesses who could not attend the hearing due to safety issues. 20
25

First Witness

- 3.2 The prosecution's first witness, Abbas Abid, a 48 year old engineer from Fallujah, Iraq, testified that he was abducted by a combined force of American forces and National Guard on 28 August 2005 and then taken to the Al-Muthanna Brigade headquarters (where he was detained for 4 weeks) and later taken to the Al-Jadiria prison. On 5 September 2006, he was brought to a court where the Judge ruled that he should be set free for lack of evidence. He was subsequently released on 2 October 2006. 30
35
- 3.3 In his testimony, the witness said that he was tortured by his tormentors in various manner – such as being 40

1 subjected to electric shocks in various parts of his body
especially his genitals, hanging him from the wall with
hanging weights from his genitals for long periods,
5 threatening to sexually abuse his wife and mother after
bringing them to prison, forcefully extracting his
fingernails, handcuffing his hands to the back and then
being hung from the wall for long hours until he fainted,
etc. He also testified that a bag was placed over his head
10 for over two months and that it was removed only when
he was given food. He also testified that other detainees
had similar bags over their heads for over 5 months. He
also testified that no medical care was available to the
detainees, and that some detainees were left to die from
15 their injuries as a result of the torture done to them.

Second witness

3.4 The prosecution's second witness, Moazzam Begg, 41
year old British citizen, testified that he was abducted
20 from his house in Islamabad, Pakistan, on 31 January
2002. A group of armed men in civilian clothes stormed
into his house, shackled his hands behind his back,
placed a hood over his head and took him to a waiting
vehicle. He was then brought to a place where he was
25 interrogated by Americans in civilian clothes. They
questioned him why he was in Pakistan and
Afghanistan. There were no specific allegations made
against him. After being held captive in Pakistan for 3
weeks, he was moved to a US military airbase in
30 Islamabad. The moment he was placed under US
military custody, he was shackled, hooded, choked and
thrown to the floor. He was carried on board a plane,
strapped down over the ankles and thighs, punched and
kicked, a knife pointed to his throat and threatened that
35 his throat would be slit if he spoke out.

3.5 He was flown to Kandahar in Afghanistan, dragged out
of the plane and thrown into the mud, kicked, punched
and choked with his hood. He was taken to a processing
area where he was continuously abused by soldiers. He
40 was then taken to a tent where he was interrogated by

- two FBI officials. They asked him when was the last time he saw Osama bin Laden and Mullah Omar. The witness replied that he did not know them. He was detained in Kandahar for 6 weeks before he was moved to Bagram airbase, which was actually an airport warehouse. He was not allowed to talk, walk, stand or make any movement whatsoever. 1
5
- 3.6 The witness was detained in Bagram for 11 months, where he was intensely interrogated by the CIA, FBI and US military intelligence. His legs and arms were hog-tied, and was threatened that he would be sent to Egypt. Conditions in Bagram were extremely poor. Medical care was dependent upon the level of co-operation of the detainees. 10
15
- 3.7 In February 2003 the witness was taken to Guantanamo Bay. During the 20 hour journey from Bagram to Guantanamo Bay, the witness was shackled in a "three-piece suit" of chains. A face mask was placed on his face, together with blackened goggles and ear muffs. The journey was very painful and the witness pleaded for a sedative from the soldiers, which was given. 20
- 3.8 At Guantanamo Bay, the witness was taken to camp Echo, a maximum security detention centre, and placed in solitary confinement. He remained there for 20 months, during which time he was subjected to various forms of torture. 25
30
- 3.9 The same interrogators who had earlier threatened to send him to Egypt (when he was questioned by them in Bagram) later met him in his cell and threatened that if he did not sign a document which they had showed him, he would either face a summary trial which could result in execution, or he would remain in Guantanamo Bay for decades without access to anyone and without legal process. The witness said that he then signed the document, after which he was treated a little better but nevertheless remained in solitary confinement. 35
40

1 3.10 The witness stated that his mental state was severely
affected as a result of the long periods of solitary
confinement. He was given drugs to treat his depression,
5 which he took but as a result he experienced
hallucinations. In November 2004, he was removed from
solitary confinement and placed in the other blocks with
the other prisoners. Two months later he was released.

Third witness

10 3.11 The prosecution's third witness, Jameelah Abbas
Hameedi, 57 year old woman, now living in Damascus,
Syria, was the Head Chief of the Co-operation Unions
in Kirkuk when she was abducted by American soldiers
15 from her home on 13 January 2004. She was told that
she had provided monetary assistance to the resistance.

20 3.12 The witness said that she was dragged by her hair out
of her house at 1 am, her hands tied behind her back
with wires, wearing only her night clothes. It was then
the height of winter. Her home and all its contents,
including her car, were completely destroyed by the
soldiers.

25 3.13 Her head covered with a hood, the witness was then
pushed into a military vehicle, where again she was
kicked and treated as an animal. Soon after, she was
dragged out of the vehicle and placed in a detention
centre – which she subsequently discovered was part
30 of the Kirkuk military airport.

35 3.14 She was then interrogated by an American in civilian
clothes who wanted to know about her relationship with
the Baath party. She was accused of being part of the
resistance, which the witness denied.

40 3.15 From her detention centre at the Kirkuk military airport,
the witness was later taken to another detention centre
which she later came to know as being the Baghdad
Airport.

- 3.16 The witness testified that when she was interrogated by a black American female soldier, her clothes were removed and she was asked to sit on her knees and hands. Icy water was poured on her and she was asked to crawl from one side of the wall to the other. A plastic tube, with a piece of wood inserted into the tube, was used to beat her. When she dropped to the floor, she was kicked and she started bleeding on her shoulders, back, arms and legs. She was tortured in this fashion for many hours. 1
5
10
- 3.17 She was taken to her cell and was asked to stand straight. When she leaned on the wall, she was beaten. Her wounds were not attended to by the soldiers. 15
- 3.18 On another occasion, the witness was taken to a room where her nephew (then completely without clothes) was beaten by a black American soldier on his private parts whilst she herself was beaten by a black American female soldier. As a result of the beating, a broken piece of a plastic chair (used for beating) had embedded in her feet. She was told that they would continue to be beaten until she and her nephew confessed. 20
- 3.19 The witness said that her nephew was kept naked and later taken to Abu Gharib in the same condition. The witness also testified that she was later taken to Abu Gharib, where she was given a wrist band with a number. A hood was put on her head. She was later examined by a doctor who said that she was injured and needed urgent attention. However, her interrogators refused to give her the needed medical treatment. 25
30
- 3.20 She also testified that she was not given proper clothing, nor given medical treatment for her injured feet. She was in Abu Gharib prison for about 6 months. She was released on 22 June 2004. 35
- 3.21 The witness stated that as a result of the beatings and cruel treatment when she was detained, she is now 40

1 unable to move her left leg freely; her left arm is also
2 similarly affected. She is still unable to wear shoes
3 because of her old injuries. She cannot endure cold
4 climate. Her injuries to her lower back need further
5 medical treatment but she is unable to afford the cost of
6 surgery.

Two statutory declarations of absent witnesses

10 3.22 After the three witnesses had given their evidence, the
11 prosecution tendered two statutory declarations – the
12 first by Ali Sh. Abbas (45 years old, currently living in
13 Jordan) and the second by Rhuheh Ahmed (27 years old,
14 currently living in Sandwell, England).

15 3.23 Ali Sh. Abbas deposed in his statutory declaration that
16 he was on his way to the mosque in Al-Amraya on 13
17 October 2003 when he was arrested by American
18 soldiers. His hands were tied at the back and a hood
19 was placed over his head and he was taken to a small
20 prison in a US military camp in Al-Amraya. He was told
21 by one Captain Philips that he had received orders to
22 arrest him but he did not know the reasons for the
23 arrest. Two days later, he was moved to Abu Gharib
24 prison when he was interrogated and a most cruel and
25 degrading treatment was meted out to him.

26 3.24 The deponent stated that his interrogators wore civilian
27 clothes, whilst the translator, an Afro-American, wore
28 American army uniform.

29 3.25 The deponent further stated that on one occasion, the
30 interrogators forcibly placed him on top of a carton box
31 containing canned food. They then connected electric
32 wires to his fingers and ordered him to stretch out his
33 hands horizontally; then they switched on the electric
34 power. The deponent said that he was tortured in such
35 manner on three separate sessions. Throughout this
36 torture session, the interrogators took photographs.

- 3.26 The deponent said that he was released in early March 2004. 1
- 3.27 In the second statutory declaration, Rhuhel Ahmad, the deponent said that he was detained from the end of 2001 until March 2004. He was 18 years old when he was detained. He was detained and tortured in Kandahar and later Guantanamo Bay. He was shackled, placed in solitary confinement, forced to take injections every 6 months (resulting in hallucinations), hooded and handcuffed and subjected to intense interrogations for 5 months from the middle of 2003. 5 10

Cross-examination by Amicus Curiae

- 3.28 The prosecution's three witnesses were cross-examined by the *Amicus Curiae* as provided for under Article 20 of Chapter V (Mode of Proceedings) of Part 2 (Rules of Procedure and Evidence of the Tribunal). 15 20
- 3.29 At the close of the cross-examination by the *Amicus Curiae*, the witnesses were re-examined by the Chief Prosecutor.

Submission on statutory declaration by absent witnesses 25

- 3.30 Both sides, the prosecution and *Amicus Curiae* on behalf of the 8 Accused persons, submitted that the statutory declarations by the two absent witnesses are admissible pursuant to Article 24 of Chapter V of Part 2 of the Charter but they leave it to the Tribunal to decide finally on the total weight of such evidence. 30

4. Summary of witness's testimony

- 4.1 The prosecution submitted that the testimony of the three witnesses (corroborated by the statutory declarations of the two absent witnesses) clearly show a sustained and prolonged infliction of cruel and dehumanizing course of conduct on the part of those perpetrators. The evidence adduced before the Tribunal 35 40

clearly establishes the fact that the victims were subjected to severe and mental pain as a result of extreme interrogating techniques that were applied to them cumulatively and over long periods.

4.2 The prosecution also submitted that the evidence clearly shows that the American military and other personnel were involved in the arrest, abduction and torture of these witnesses. The United States was at all material times the occupying belligerent power in Afghanistan and Iraq (where these atrocities on the witnesses were carried out) and they have an obligation under the Geneva Conventions to ensure that no such acts are inflicted on these persons who are under the law “protected persons”.

4.3 The evidence also clearly shows that the witnesses in the instant case were taken prisoners in respect of the Afghanistan war as well as the Iraq war. They were held in prisons in Afghanistan (Bagram) as well as in Iraq (Baghdad International Airport and Abu Ghraib). Two witnesses in this case, Moazzam Begg and Rihel, were transported and detained in Guantanamo Bay.

5. Issues before the Tribunal

5.1 There are three issues for the determination of the Tribunal in the instant case –

- (1) Whether the acts perpetrated against the witnesses amount to torture under the Torture Convention Act 1984;
- (2) Whether the cruel, inhumane and degrading treatment meted out to the witnesses in their place of detention was in violation of Geneva Convention III and IV, 1949, and the Common Article III to the Geneva Conventions; and

- (3) Who is liable for the acts of torture and the cruel, inhumane and degrading treatment meted out to the witnesses in this case? 1
- 5.2 Each of these issues is considered separately as stated below. 5
6. Whether the acts amounted to torture under the Torture Convention Act? 10
- 6.1 "Torture" is defined in the Torture Convention as "*the intentional infliction of severe pain or suffering, whether physical or mental, by or with the consent or acquiescence of a public official*". The term "*public official*" includes the Head of a State. 15
- 6.2 In the *Pinochet case* (No. 3) [1999] 2 WLR 827, at p. 886D, the House of Lords held that the prohibition against torture is absolute. There can be no derogation from this rule, which has been long accepted as *jus cogens* – a peremptory norm of international law from which states cannot derogate. 20
- 6.3 Under Article 3 of the UN Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhumane and Degrading Treatment or Punishment of December 9, 1975, it is stated that not even exceptional circumstances can excuse torture – such as war on terror or public emergency. 25
- 6.4 The Torture Convention has been subscribed by 133 states. The United States is a party to the Convention, having implemented it through the passage of a domestic law, namely sections 2240-2340A of Title 18 of the United States Code. 30
- 6.5 In the aforesaid *Pinochet case*, the House of Lords said that the Torture Convention was agreed not to create an international crime which had not previously existed but "*to provide an international system under which the international criminal – the torturer – would find no safe haven*". 40

1 6.6 Unlike the crime against humanity, which requires the
act as part of a widespread or systematic attack against
civilians as a measure of state policy, even a single act
5 of official torture is a crime under the Torture
Convention.

10 6.7 According to the UN Committee against Torture, which
is the UN body of independent experts that implements
the Convention Against Torture, the following
interrogation techniques constitute torture – namely,
restraining in very painful conditions, hooding under
special conditions, sounding of loud music for
prolonged periods, sleep deprivation for long periods,
15 threats including death threats, violent shaking and
extreme temperatures. The Committee therefore has
clearly shown that the interrogation techniques
authorised by the Department of Defence (as had been
meted out to the witnesses in the instant case) amount
20 to “torture” within the meaning of Article 1 of the Torture
Convention.

25 6.8 The same UN Committee had also declared that the use
of techniques such as shackling, the use of dogs and
internal examinations constitute torture or cruel,
inhumane or degrading treatment.

30 6.9 The International Committee of the Red Cross (ICRC),
in its Report of February 2004 stated that the
construction of the Guantanamo system, whose
objective is to extract intelligence information “cannot
be considered other than an international system of cruel,
unusual and degrading treatment and a form of torture”.

35 **7. Whether the acts were in violation of the Geneva
Conventions?**

40 7.1 The four Geneva Conventions were created in 1949 after
World War II, setting out minimum standards that
everyone must comply. Each of these 4 Conventions has
three common articles, namely –

-
- | | | |
|-------------|--|--|
| Article 1 – | respect for the Convention “in all circumstances”; | 1 |
| Article 2 – | applying the Convention not only to declared wars but also to “any other armed conflict”; | 5 |
| Article 3 – | prescribes a minimum of humane treatment in “armed conflict not of an international character” to all civilians and non-combatants. | 10 |
| | | |
| 7.2 | These three Common Articles reflect international customary law. In <i>Hamdan v Rumsfeld</i> (2006) 548 US 557, the United States Supreme Court had clearly stated that the Common Articles must be interpreted “as widely as possible”. Consequently the court held that the three Common Articles apply to the detainees at Guantanamo Bay. Articles 3 and 5 of Geneva Convention III may be violated and were, as submitted by the prosecution, “legally flawed”. | 15

20 |
| 7.3 | Geneva Convention III protects all persons, whether they are captured or they surrendered, whether they are in uniform or not, and even if they do not take any part in the hostilities. In the instant case, the witnesses (victims) were abducted from the battlefields in Afghanistan and Iraq, as well as from other places (Pakistan) and then handed to the authorities in Afghanistan and Iraq. | 25

30 |
| 7.4 | Even if there is any doubt as to the status of any person detained, Article 5 of Geneva Convention III provides that such person “shall enjoy the protection of the Convention until such time” as the person’s status has been determined by a competent tribunal. | 35 |
| 7.5 | The evidence in this case clearly shows that the legal opinions and the advice given by the 4th to the 8th Accused persons to the first, second and third Accused persons (in that the Geneva Conventions were “obsolete”, | 40 |

they can be ignored, that Taliban militia are not protected, Articles 3 and 5 of Geneva Convention III may be violated) were, as submitted by the prosecution, "legally flawed".

7.6 It is significant here to note that some years later, after the occurrence of these events inflicted on the witnesses, in January 2009 President Barack Obama had issued an Executive Order 13491 directing that when conducting investigations, no government official, employee or agent can rely any more on "any interpretation of the law governing interrogations" issued by the Department of Justice under the Bush administration.

8. Who is liable for the acts of torture, cruel, inhumane and degrading treatment?

8.1 If it is proven that an act of torture or cruel, inhumane and degrading treatment had been perpetrated against a victim by a particular individual, then that individual is personally liable under the Torture Convention and the Geneva Conventions as well.

8.2 In the case before the Tribunal, the 8 Accused persons are not the individuals who actually committed these tortures or inflicted the cruel, inhumane and degrading treatment against the witnesses (victims) but their superiors. The question for the Tribunal to decide is therefore whether the 8 Accused persons can be made liable for the acts of their subordinates?

9. Finding a *prima facie* case

9.1 At the close of its case, the prosecution submitted that as "there has been no submission that we have not established a *prima facie* case, so we act on the assumption that this is the final submission and the onus on us is to prove beyond reasonable doubt that all of the Accused should be convicted for the crimes as charged." (page 204, lines 15-30 Notes of Proceedings) The prosecution then went on with the summation of its case and to finally submit that it has

- "proved beyond reasonable doubt" (sic) that all the 8 Accused persons were instrumental in inflicting torture and cruel, inhumane and degrading treatment against the witnesses (victims) that violated the Torture Convention as well as Geneva Convention III. The prosecution further submitted that the 4th to 8th Accused persons, as legal counsel advising the administration, had played a decisive role in subverting the system of international rules that should have protected all the detainees.
- 9.2 In response, the *Amicus Curiae* for the 8 Accused persons submitted that the torture of Abbas Abid (the first witness) has not been proven to be linked to the Americans in any way by the prosecution.
- 9.3 In regard to the second witness (Moazzam Begg), the *Amicus Curiae* said that during cross-examination, it was discovered that Moazzam owned a bookstore, and had spent time at a training camp in Afghanistan. Why were these facts not disclosed in his statutory declaration?
- 9.4 In regard to the third witness (Jameelah), the *Amicus Curiae* submitted that "We have no proof that she was detained at an American facility". He further submitted that her identification of her torturers as Americans "is also based on conjecture" from the assumption that since she was in the American part of Iraq, she was therefore assaulted by American nationals. This remains merely an assumption, and there is no actual identification, he submitted.
- 9.5 Turning his attention to points of law, the *Amicus Curiae* said that "customary international law and *jus cogens* are like the snake-oil of international law". He submitted that "international law really boils down to treaties", so forget *jus cogens*, and forget customary international law. States are only bound by treaties which they have signed or ratified.

1 9.6 The *Amicus Curiae* further submitted that “War is like a
black hole”. After 9/11, after the war on terror, under the
international law now, “Torture is OK”, because the
world has changed, international law has changed.

5 9.7 Proving a *prima facie* case, compels the conclusion sought
to be proven, unless evidence sufficient to rebut the
conclusion is produced. The *Amicus Curiae* made no
attempt to do so. This is clearly fatal omission on his
10 part. In a case of trial by jury, the burden falls on the
Jurors to then decide whether the case against the
Accused has been proven beyond reasonable doubt see
Commonwealth v. Pauley, 368 Mass. at 291-292, 331 N.E.2d
at 904-906; *Commonwealth v. Crosscup*, 369 Mass. 228, 239-
15 240, 339 N.E.2d 731, 738-739 (1975) *Commonwealth v.*
Leinbach, 29 Mass. App. Ct. 943, 944, 558 N.E.2d 1003
(1990). In our present case, however, we have sufficient
judicial precedents to conclude that an un rebutted
20 finding of *prima facie* case amounts to proof beyond
reasonable doubt see *PP v. Sidek* [Criminal Trial no: 47-5-
1999] 31 January 2005.

25 9.8 In its rebuttal of the submission by the *Amicus Curiae*,
the prosecution said that the reasoning by the Amicus
is “so faulty at its core” that it should be rejected. In any
case, the prosecution pointed out that the United States
is a party to the Torture Convention as well as to the
Geneva Conventions.

30 9.9 The prosecution then submitted that in presenting its
case to the Tribunal it had described specific acts of
breaching the Geneva Convention committed by the 8
Accused Persons but the defence had not responded to
them. Neither had the defence responded to many other
35 matters raised in the prosecution’s case.

40 9.10 Rebutting the *Amicus Curiae*’s contention that after 9/
11 “Torture is OK”, the prosecution reiterated that even
after 9/11 “the prohibition of torture remains absolute”. The
prosecution stated that the defence can mock
international customary law, but that is not the way the

- United States Supreme Court sees it. In the *Hamdan case*, the court held that the Common Article 3 of the Geneva Convention apply to Taliban and Al-Qaeda. 1
- 9.11 The prosecution also submitted in rebuttal that the stand taken by the Pentagon is that the laws of war “have not changed” since 9/11. The Pentagon has been consistent in its stand in this matter. 5
- 9.12 Having considered all the evidence adduced by the prosecution and the submissions put forward by both the prosecution and the defence, the Tribunal unanimously finds that a *prima facie* case has been proved and the *Amicus Curiae* is invited to present its case for the 8 Accused persons. 10
15
10. The defence case
- 10.1 Upon being invited by the Tribunal to present the defence’s case after its finding that a *prima facie* case has been made out by the prosecution, the *Amicus Curiae* informed the Tribunal that he has no more submission to make. His early submission in response to the prosecution’s case was his “final submission” on the matter. 20
25
- 10.2 The prosecution likewise informs the Tribunal that it has no intention to make any further submission, in the light of the stand taken by the *Amicus Curiae*. In the light of these statements by both the prosecution and the defence, the Tribunal adjourns the hearing, reserving its verdict – to be delivered on the following day (on 11 May, 2012). 30
11. Torture and War Crimes 35
- 11.1 After considering the defence case, the Tribunal finds that the prosecution had established beyond a reasonable doubt that the Accused persons: 40
- U.S. President George W. Bush and his co-conspirators

Richard B. Cheney, former U.S. Vice President
 Donald H. Rumsfeld, former Defence Secretary
 Alberto Gonzales, then Counsel to President Bush
 David Addington, then General Counsel to the
 Vice-President
 William Haynes II, then General Counsel to
 Secretary of Defense
 Jay Bybee, then Assistant Attorney-General
 John Choon Yoo, former Deputy Assistant
 Attorney-General

had engaged in a web of instructions, memos, directives,
 legal advice and action that established a common plan
 and purpose, joint criminal enterprise and/or
 conspiracy to commit the crimes of Torture and War
 Crimes, including and not limited to a common plan
 and purpose to commit the following crimes in relation
 to the "War on Terror" and the wars launched by the
 U.S. and others in Afghanistan and Iraq:

- (a) Torture;
- (b) Creating, authorizing and implementing a
 regime of Cruel, Inhumane, and Degrading
 Treatment;
- (c) Violating Customary International Law;
- (d) Violating the Convention Against Torture
 1984;
- (e) Violating the Geneva Convention III and IV
 1949;
- (f) Violating the Common Article 3 of the
 Geneva Convention of 1949;
- (g) Violating the Universal Declaration of
 Human Rights and the United Nations
 Charter.

12. Joint and Individual Criminal Liability

- 12.1 The Tribunal finds that the prosecution has established
 beyond a reasonable doubt that the Accused persons
 are individually and jointly liable for all crimes
 committed in pursuit of their common plan and purpose

under principles established by Article 6 of the Charter of the International Military Tribunal (the Nuremberg Charter), which states, *inter alia*, "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit war crimes are responsible for all acts performed by any person in execution of such plan." The Principles of the Nuremberg Charter and the Nuremberg Decision have been adopted as customary international law by the United Nations. The government of the United States is subject to customary international law and to the Principles of the Nuremberg Charter and the Nuremberg Decision.

13. Complainant War Crime Victims

13.1 The Tribunal finds that the prosecution has established beyond a reasonable doubt that the Accused persons have committed the crimes set out in paragraph 9 hereof, including but not limited to Torture and Cruel, Inhumane, and Degrading Treatment, against the following Complainant War Crime Victims who appeared before this Tribunal by statutory declaration and/or in person under oath:

- (a) Abbas Abid;
- (b) Moazzam Begg;
- (c) Jameelah Abbas Hameedi;
- (d) Ali Sh. Abbas (alias Ali Shalal);
- (e) Rhuheel Ahmed.

Each of these Complainant War Crime Victims is a civilian, who was released without charge after extended periods of time, after being subjected to Torture and Cruel, Inhumane, and Degrading Treatment for which the Accused persons are criminally liable.

14. Irreparable harm and injury, pain and suffering

14.1 The Tribunal finds that the prosecution has established beyond a reasonable doubt that each of the Complainant War Crime Victims has suffered irreparable harm and

injury, and pain and suffering due to the criminal acts of the Accused persons, as set out in their respective sworn testimony and statutory declarations presented at the Trial.

14.2 The Tribunal also notes the attempt by the *Amicus* during cross-examination to highlight the fact that the witnesses Abbas Abid and Jameelah Abbas Hameedi were high-ranking officials in the previous government of Iraq and may have had “*an axe to grind*” and thus may have embellished their accounts of the torture they had endured to have not been followed through during his final submissions. The Tribunal finds these attempts of the *Amicus* mere conjecture and therefore accepts the evidence of both witnesses *in toto*.

14.3 With regard to whether Ali Sh. Abbas (alias Ali Shalal) was the man under the hood in the photograph and whether this irreparably damaged his credibility, the Tribunal finds that this is immaterial to the fact that he was a civilian in occupied Iraq who was detained by the occupying force led by the Americans. Further, no attempt was made by the *Amicus* to challenge his detailed testimony regarding his treatment during detention. The Tribunal therefore accepts the testimony of Ali Sh. Abbas (alias Ali Shalal) [and that of Rhuhel Ahmed] in accordance with Article 24 of the Rules of Evidence and Procedure of the Tribunal, but with a note of caution as there was no opportunity for cross-examination afforded to the *Amicus* for these 2 witnesses.

15. Absolute prohibition on Torture and Cruel, Inhumane and Degrading Treatment

15.1 The Tribunal finds there is an absolute prohibition on Torture and on Cruel, Inhumane and Degrading Treatment in international law and in the relevant laws and regulations of the United States of America and of the U.S. Army (including Army Field Manual 2710), all of which were violated by the Accused persons. As stated by Prof. Jordan J. Paust in “*The Absolute Prohibition*

of Torture and Necessary and Appropriate Sanctions," 1
 Valparaiso Law Review, Vol. 43, Number 4, Summer
 2009, "Torture is a form of treatment of human beings that is
 absolutely prohibited under various forms of customary and
 treaty-based international law in all social contexts. Other 5
 forms of treatment that are absolutely prohibited and often
 proscribed in the same international instruments that outlaw
 torture include prohibitions of cruel, inhuman, and degrading
 treatment."

- 10
- 15.2 The Tribunal finds that the prosecution has marshalled
 a substantive and powerful array of international and
 United States legal precedents to support this view. By
 contrast, counsel for the Accused, as *Amicus Curiae*, has
 tendered no legal authority to support his view that 15
 "After 9/11, torture is OK". Nor has the *Amicus Curiae*
 offered any substantial legal precedent supporting the
 views taken by the Accused persons in their respective
 memoranda, executive orders, and directives, and legal
 opinions giving rise to their crimes of Torture and Cruel, 20
 Inhumane, and Degrading Treatment.
- 15.3 Although the *Amicus* did refer to the whole of his Bundle
 3, and in particular the articles by Michael Stokes
 Paulsen, during submissions for the point that the force 25
 of international law as a body of law upon the United
 States is an illusion, this Tribunal is of the opinion that
 the United States was at all times bound by law against
 torture for reasons that will appear later in this
 judgment. 30
- 15.4 The Tribunal also notes that although both John Yoo
 and David Addington have been called to testify before
 the *Subcommittee on the Constitution, Civil Rights, and Civil*
Liberties of the Committee on the Judiciary House of 35
Representatives on 26 June 2008, (page 102 the *Amicus*
 Bundle 3) and although there was no action taken
 against Accused numbers 4-8 (the advisors, Alberto R.
 Gonzales, David Spears Addington, William J. Haynes
 II, Jay Scott Bybee, and John Choon Yoo) the said inquiry 40
 had focused merely on whether there was any reason

1 to revoke their licence to practise law <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/19/ar2010021904157.html> but not as to
5 whether they had committed crimes of torture against established international humanitarian law. On the contrary, this Tribunal finds that these Accused had indeed committed the crimes in question.

10 15.5 The prosecution has noted that in *Ex parte Pinochet* (No 3) [1999] 2 WLR 827 at p. 886 D, English House of Lords, “the prohibition of torture is absolute, *jus cogens*, and is a peremptory norm of international law from which states cannot derogate.” In that case, Lord Hope states that torture by public officials is “without doubt ... regarded by customary international law as an international crime.”
15 Exceptional circumstances such as war, instability, public emergency, cannot excuse torture - Article 3, UN Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhumane, and Degrading Treatment or Punishment.
20

16. 1984 International Convention of the Law of Torture (the “Torture Convention”)

25 16.1 The United States is party to the Torture Convention (2340-2340A Title 18 USC). As the prosecution has pointed out, the Torture Convention defines ‘torture’ as ‘the intentional infliction of severe pain or suffering, whether physical or mental, by or with the consent or acquiescence of a public official.’ As established in *Ex parte Pinochet*, “The definition [of Torture in Article 1 of the Torture Convention] is so wide that any act of official torture, so long as it involved severe pain or suffering, would be covered by it.”
30

35 16.2 Exculpatory reasons - The prosecution has established that the exculpatory reasons by which the Accused persons attempted to shield themselves from criminal liability for their acts under the Torture Convention are not valid. A party to the Torture Convention may not
40 unilaterally redefine what torture means, nor limit its

meaning to a specific physiological outcome such as failure of an organ. The prosecution has established that *"the acts of the Accused persons are so grave as to constitute Torture under the Torture Convention"*. The prosecution clearly established that the Memorandum by the Attorney General's office dated Aug. 1, 2002 was legally flawed in advising that the United States had an *"understanding"* that torture was limited to *"extreme forms of cruel and inhuman treatment"*. The prosecution notes that *"reservations to the Convention under Articles 28 and 30 do not extend to the right to redefine torture'."*

17. Violations of the Geneva Conventions

- 17.1 The prosecution has established that the Accused persons have violated Common Article 3 of the Geneva Conventions with respect to the Complainant War Crimes Victims. The U.S. War Crimes Act (18 U.S.C. 2441) criminalizes acts outlawed by Common Article 3 in the United States. The U.S. Supreme Court in *Hamdan v. Rumsfeld* (2006) 548 US 557 applied the protections of Common Article 3 to detainees held at the U.S. base at Guantanamo, Cuba. Relevant parts of Common Article 3 bind the United States against *"(a) cruel treatment and torture"* and *"(c) outrages upon personal dignity, in particular, humiliating and degrading treatment"*. *"A regularly constituted court affording all the judicial guarantees which are recognized indispensable by civilized peoples"* must precede any sentences. *"The wounded and sick shall be cared for."*
- 17.2 The prosecution has demonstrated beyond a reasonable doubt that *"the US Executive branch, as represented by the President, the Vice-President, and the Defence Secretary [and their respective Accused counsel], intended by a conscious and wilful act not to treat the prisoners [including the Complainant War Crime Victims] in accordance with the Geneva Conventions."*

18. Breaches of the Geneva Conventions

18.1 The prosecution has established beyond a reasonable doubt that the acts of the Accused persons against the Complainant War Crime Victims constitute breaches of the Geneva Conventions, including but not limited to the following, as set out by the prosecution and not refuted by the *Amicus Curiae*:

- (a) Infliction of cruel treatment in violation of Article 3, Geneva Convention III, including sleep deprivation;
- (b) Outrages against personal dignity in violation of Article 3, Geneva Convention III, such as enforced nudity for up to 2 weeks;
- (c) Torture in violation of Article 3, Geneva Convention III;
- (d) Failure to protect prisoners from intimidation in violation of Article 13, Geneva Convention III;
- (e) Use of weapons against prisoners in violation of Article 42, Geneva Convention III;
- (f) Close confinement in violation of Article 21, Geneva Convention III;
- (g) Inadequate heating and lighting in violation of Article 25, Geneva Convention III, including severely chilled interrogation rooms, 24 hour lighting, dark prisons;
- (h) Habitual diet ignored in violation of Article 26, Geneva Convention III, including forced eating of food against religious norms;
- (i) Causing death of prisoners in violation of Article 3; Geneva Convention III;

(j)	Mutilation of prisoners in violation of Article 3; Geneva Convention III;	1
(k)	Reckless endangerment of health of prisoners in violation of Article 13, Geneva Convention III, including suggesting suicide to a prisoner;	5
(l)	Denial of medical care in violation of Article 15, Geneva Convention III;	10
(m)	Inadequate nutrition in violation of Article 26, Geneva Convention III;	15
(n)	Inadequate recreational opportunities in violation of Article 38, Geneva Convention III;	20
(o)	Transfer of prisoners to countries practising torture in violation of Article 20, Geneva Convention III;	25
(p)	Failure to notify prisoners in advance of transfer in violation of Article 48, Geneva Convention III;	30
(q)	Failure to allow prisoners to complain about captivity conditions in violation of Article 78, Geneva Convention III;	35
(r)	Confinement without daylight in violation of Article 48, Geneva Convention III;	40
(s)	Punishment exceeding 30 days in violation of Article 90, Geneva Convention III;	
(t)	Disciplinary punishment without information regarding the offence in violation of Article 96, Geneva Convention III;	
(u)	Failure to try prisoners in a regularly constituted court in violation of Article 3, Geneva Convention III;	

- 1 (v) Failure to publicly state and inform how prisoners are to be treated in violation of Article 63, Geneva Convention III;
- 5 (w) Failure to transmit legal documents from or to prisoners and denial of visits by lawyers to prisoners in violation of Article 77, Geneva Convention III;
- 10 (x) Failure to put prisoners on trial in impartial tribunals and pronouncing guilt before a trial, leading to the resignation in protest by eight U.S. military attorneys;
- 15 (y) Imposing moral or physical coercion to induce admissions of guilt in violation of Article 99, Geneva Convention III, including informing a Complainant War Crime Victim her daughter would be raped and her son imprisoned if she did not confess, and being falsely told her daughter has been shot;
- 20 (z) Failure to provide speedy trials in violation of Article 30, Geneva Convention III;
- 25 (aa) Gross denial of due process in violation of Article 103, Geneva Convention III;
- 30 (bb) Absolving liability for redress of grave breaches under Article 130 in violation of Article 131, Geneva Convention III;
- 35 (cc) Failure to allow prisoners to complain to the United Nations in violation of Article 78, Geneva Convention III;
- 40 (dd) Carrying out experiments to test the level of stress of human beings in violation of Article 13, Geneva Convention III;

-
19. **Accused U.S. President George W. Bush** 1
- 19.1 The prosecution has proved beyond a reasonable doubt that the Accused U.S. President George W. Bush is guilty of war crimes, as Mr. Bush had: 5
- (a) issued orders [such as a memorandum dated February 7, 2002 declaring al-Qaeda prisoners were outside the protection of the Geneva Conventions] authorizing treatment that would constitute a war crime; 10
 - (b) intended these orders be acted upon;
 - (c) had knowledge these orders were indeed acted upon; 15
 - (d) known that the US was violating the Torture Convention and the Geneva Conventions and had failed to intervene to prevent these violations." 20
See also *Rasul v. Bush* 2004 No. 03-334 S.C. US, January 14, 2004; *Hamdan v. Rumsfeld* (2006) 548 U.S. 557; *Boumediene v. Bush* 553 US 723 (2008).
20. **Accused Richard B. Cheney, former U.S. Vice President** 25
- 20.1 The prosecution has proved beyond a reasonable doubt that Accused Richard B. Cheney, former U.S. Vice President, *"had knowledge of what was going on and in particular that the orders issued by Mr. Bush and Mr. Rumsfeld were issued and acted upon. [Mr. Cheney] was part of the policy makers in this regard. He plainly knew that there were violations of the Torture Convention and/or the Geneva Convention III and failed to intervene to prevent such activity."* 30 35
21. **Accused Donald H. Rumsfeld, former Defence Secretary**
- 21.1 The prosecution has established beyond a reasonable doubt that Accused Donald H. Rumsfeld, former Defence Secretary has issued Memoranda and Action 40

Memoranda that were central to the common plan and purpose, joint criminal enterprise and /or conspiracy of the Accused persons to commit the crimes Torture and War Crimes. These include, and are not limited to, a Memorandum for the Joint Chiefs of Staff dated 19 January 2002 *"approving the 'advice' given to him by legal counsel Accused John Yoo and Robert Delabunty dated 9 January 2002 that CIA was free to ignore the Geneva Conventions as they did not apply to suspected al Qaeda and Taliban detainees."* The prosecution also has established beyond a reasonable doubt that Mr. Rumsfeld was *"directly and personally"* involved in the development of 18 techniques of enhanced interrogation that are tantamount to torture, and used at Guantanamo, Iraq, and Afghanistan. See also *Rasul v. Bush* 2004 No. 03-334 S.C. US, January 14, 2004; *Hamdan v. Rumsfeld* (2006) 548 U.S. 557; *Boumediene v. Bush* 553 US 723 (2008).

22. Accused persons Alberto Gonzales, then Counsel to President Bush; David Addington, then General Counsel to the Vice-President; William Haynes II, then General Counsel to Secretary of Defense; Jay Bybee, then Assistant Attorney General; John Choon Yoo, former Deputy Assistant Attorney-General

22.1 The prosecution has established beyond a reasonable doubt that the above Accused persons, all lawyers, gave 'advice' that *"the Geneva Conventions did not apply [to suspected al Qaeda and Taliban detainees]; that there was no torture occurring within the meaning of the Torture Convention, and that enhanced interrogations techniques, [constituting cruel, inhumane, and degrading treatment,] were permissible."* This advice was *"flawed legal advice"* as determined by Alberto J. Mora, General Counsel to the U.S. Navy. See also *Hamdan v. Rumsfeld* (2006) 548 U.S. 557.

22.2 The prosecution has established beyond a reasonable doubt that the Accused lawyers *"knew full well their advice was being sought to be acted upon, and in fact was acted upon, and such advice paved the way for violations of international*

law, the Geneva Conventions and the Torture Convention.”
 The Accused lawyers’ advice was binding on the
 Accused Bush, Rumsfeld and Cheney, each of whom
 relied on the Accused lawyers’ advice. Others, such as
 CIA Director George Tenet and Diane Beaver, officer in
 charge at Guantanamo, relied on the Accused lawyers’
 advice. The Accused lawyers came to the U.S. base at
 Guantanamo, Cuba before the list of enhanced
 interrogation techniques was compiled.

- 22.3 The prosecution had established beyond a reasonable
 doubt that the Accused lawyers are criminally liable for
 their acts, and for participating in a joint criminal
 enterprise. “Legal advisors who prepare legal advice
 that is so erroneous as to give rise to an international
 crime are themselves subject to the rules of international
 criminality.” See *Alstotter* case; *Prosecutor v Tadic*, Case
 No. IT-94-1-A Appeal Judgment, 15 July 1999 [*Tadic*
Appeal Judgment]; *Prosecutor v. Krnojeac*, Trial Chamber,
 March 15, 2002.
- 22.4 In his brief opening statement made before us at the
 beginning of the second session of the Hearing on 7 May
 2012, Professor Francis Boyle, for the Prosecution, made
 reference to the Nuremberg Trials as follows:

*At the hearing of Nuremberg, Robert Jackson J, who
 had stepped down from the US Supreme Court to
 prosecute these defendants said, “we are setting up one
 standard of behaviour to be applied not only to the Nazis
 defendants but also to ourselves,” and a generation
 later, that is what we are asking you, the judges of this
 Tribunal to do: To apply the exact same standards of
 international law to these American government
 officials that the Americans applied to the Nazis at
 Nuremberg. No more, no less; but exactly the same,
 just as Robert Jackson J said should be done in the
 future. [See page 23, lines 27-35, Notes of
 Proceedings.]*

1 This Tribunal finds no reason to depart from the
standard of behaviour so eloquently put by that eminent
Nuremberg Chief Prosecutor Justice Jackson.

5 **23. The verdict**

23.1 After considering the evidence adduced by the
prosecution and submissions by both the prosecution
and the *Amicus Curiae* on behalf of the 8 Accused
10 persons, the Tribunal is satisfied, beyond reasonable
doubt, that all the 8 Accused persons are guilty as
charged.

23.2 The Tribunal finds the Accused persons:

15 U.S. President George W. Bush and his co-
conspirators

Richard B. Cheney, former U.S. Vice President

Donald H. Rumsfeld, former Defence Secretary

20 Alberto Gonzales, then Counsel to President Bush

David Addington, then General Counsel to the Vice-
President

William Haynes II, then General Counsel to Secretary
of Defense

25 Jay Bybee, then Assistant Attorney General

John Choon Yoo, former Deputy Assistant Attorney-
General

30 guilty as charged and convicted as war criminals for
Torture and Cruel, Inhumane and Degrading Treatment
of the Complainant War Crime Victims.


23.3 **Reparations** - The Tribunal orders that reparations
commensurate with the irreparable harm and injury,
pain and suffering undergone by the Complainant War
Crime Victims be paid to the Complainant War Crime
Victims. While it is constantly mindful of its stature as
merely a tribunal of conscience with no real power of
enforcement, this Tribunal finds that the witnesses in
this case (being victims placed in detention illegally by
40 the 8 convicted persons) are entitled *ex justitia* to the

payment of reparations by the 8 convicted persons and their government. It is the Tribunal's hope that armed with the Findings of this Tribunal, the witnesses (victims in this case) will, in the near future, find a state or an international judicial entity able and willing to exercise jurisdiction and to enforce the verdict of this Tribunal against the 8 convicted persons and their government. The Tribunal's award of reparations shall be submitted to the War Crimes Commission to facilitate the determination and collection of reparations by the Complainant War Crime Victims.

- 23.4 International Criminal Court, United Nations, Security Council** – As a tribunal of conscience, the Tribunal is fully aware that its verdict is merely declaratory in nature. We have no power of enforcement, no power to impose any custodial sentence on any one or more of the 8 convicted persons. What we can do, under Article 31 of Chapter VI of Part 2 of the Charter is to recommend to the Kuala Lumpur War Crimes Commission, WHICH WE HEREBY DO, to submit this finding of conviction by the Tribunal, together with a record of these proceedings, to the Chief Prosecutor of the International Criminal Court, as well as the United Nations and the Security Council.
- 23.5 Commission's Register of War Criminals** – Further, under Article 32 of the same Chapter, this Tribunal recommends to the Kuala Lumpur War Crimes Commission that the names of all the 8 convicted persons herein be entered and included in the Commission's Register of War Criminals and be publicized accordingly.
- 23.6** The Tribunal recommends to the War Crimes Commission to give the widest international publicity to this conviction and grant of reparations, as these are universal crimes for which there is a responsibility upon nations to institute prosecutions if any of these Accused persons may enter their jurisdictions.

23.7 Before we end these proceedings, the Tribunal wishes to place on record its appreciation to counsel in both the prosecution team and the defence team for their diligence and dedication in the conduct of this most difficult case in the realm of public international law.

DATED THIS 11TH DAY OF MAY 2012


.....
President- Judge Lamin bin Hj Mohd Yunus


.....
Judge Alfred Lambremont Webre


.....
Judge Tunku Sofiah Jewa


.....
Judge Mohd Saari Yusuf


.....
Judge Salleh Buang

**NOTES
OF
PROCEEDINGS**

1 **KUALA LUMPUR WAR CRIMES TRIBUNAL**

5 Case No. 2 - CP - 2011

Chief Prosecutor of the Kuala Lumpur War
Crimes Commission

10 Against

1. George Walker Bush
2. Donald Henry Rumsfeld
3. Richard Bruce Cheney
15 4. Alberto R. Gonzales
5. David Spears Addington
6. William J. Haynes II
7. Jay Scott Bybee
8. John Choon Yoo

20 **NOTES OF PROCEEDINGS**

VENUE:

25 2nd Floor, No. 88, Jalan Perdana
Taman Tasik Perdana
50480 Kuala Lumpur
Malaysia

30 **Before:**

1. Judge Lamin Mohd Yunus (President)
2. Judge Alfred Lambremont Webre
3. Judge Tunku Sofiah Jewa
35 4. Judge Mohd Saari Yusuf
5. Judge Salleh Buang

Prosecution Division of the Legal Team:

- 40 1. Professor Gurdial Singh Nijar
2. Professor Francis A. Boyle
3. Mr Avtaran Singh
4. Gan Pei Fern (Ms)

Defence Division of the Legal Team (<i>Amici Curiae</i>):	1
1. Mr. Jason Kay Kit Leon	
2. Asst Prof Dr Mohd Hisham bin Mohd Kamal	
3. Dr Abbas Hardani	
4. Galoh Nursafinas Samsudin (Ms)	5
5. Soo Kok Weng	

Registrar:	
Mr. Musa Ismail	10

* * * * *

07 May 2012 – Session 1	15
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Registrar Musa Ismail:	
Kuala Lumpur War Crimes Tribunal case number 2 - CTH - 2011.	20
The case today is the Kuala Lumpur War Crimes Commission against Mr. George W. Bush, Mr. Donald Rumsfeld, Mr. Dick Cheney, Mr. Alberto Gonzales, Mr. David Addington, Mr. William Haynes, Mr. Jay Scott Bybee and John Choon Yoo. The Kuala Lumpur War Crimes Commission is represented by ...	25

Gurdial Singh Nijar:	
Professor Gurdial Singh Nijar	

Registrar Musa Ismail:	30
Assisted by ...	

Francis Boyle:	
Professor Francis Boyle of the United States.	35

Gan Pei Fern:	
Gan Pei Fern.	

Registrar Musa Ismail:	
As it is now, the Accused is not present. Therefore the Tribunal, on its own accord, has appointed Amicus to represent them. They are as follows, headed by Encik ...	40

Jason Kay Kit Leon:

Jason Kay

Registrar Musa Ismail:

Assisted by ...

Mohd Hisham Kamal:

Mohd Hisham Mohd Kamal

Abbas Hardani:

Dr. Abbas Hardani

Registrar Musa Ismail:

And ...

Galoh Nursafinas Samsuddin:

Galoh Nursafinas

Registrar Musa Ismail:

The charges as against the accused are as follows:

CRIME OF TORTURE and WAR CRIMES.

The Accused persons, which I have mentioned just now, had committed the Crime of Torture and War Crimes as follows:-

The Accused persons had wilfully participated in the formulation of executive orders and directives to exclude the applicability of all international conventions and laws, namely the Convention against Torture 1984, Geneva Convention III 1949, Universal Declaration of Human Rights and the United Nations Charter in relation to the war launched by the US and others in Afghanistan (in 2001) and in Iraq (in March 2003);

Additionally, and/or on the basis and in furtherance thereof, the Accused persons authorised, or connived in, the commission of acts of torture and cruel, degrading and inhuman treatment against victims in violation of international law, treaties and conventions including the Convention against Torture 1984 and the Geneva Conventions, including Geneva Convention III 1949.

Next on the page are particulars of the charge which I shall not read. The victims will come to the witness box to give evidence as to the rest of the charges here. 1

Gurdial Singh Nijar: 5

May it please Your Honours, I wish to proceed with the opening statement as a prelude to the commencement of the trial, this historic trial. I've been given advanced intimation by the amicus curiae that they have a preliminary objection to raise, so I yield the floor for them to raise their objections. 10

Jason Kay Kit Leon:

Learned Members of the Tribunal, I have prepared a short written submission as the preliminary point or issue and it is supported by Bundle of Authorities volume 2. 15

If I may take Your Excellencies through the short written submission?

The point that we wish to raise is: Laws or Treaties that may, or may not, be considered by this Tribunal in this case. 20

The 1st point: This War Crimes Tribunal, the Kuala Lumpur War Crimes Tribunal, is part of the Kuala Lumpur Foundation to Criminalise War. The Tribunal was established under Article 1 of the Charter. And it reads, 25

"There shall hereby be established the Kuala Lumpur War Crimes Commission, the Kuala Lumpur War Crimes Tribunal, the Kuala Lumpur War Crimes Legal Team and the Kuala Lumpur War Crimes Secretariat, whose functions and jurisdiction, respectively, shall be governed by the provisions of this Charter." 30

Point 3, the Foundation was created and this is supported by the documents in the volume, document no. 1 at page 1, under the Trustees (Incorporation) Act 1952 (Act 258). The Act can be found at page 4 - it's the 2nd document in the bundle, which is a Malaysian statute. 35

If I may proceed to page 2 of my submission? 40

Point no. 4: The Vienna Convention on Law of Treaties 1969 states that a State is bound by treaties by way of ratification, acceptance, approval or accession. The Vienna Convention, in its entirety, can be found at the Prosecution's Bundle Volume 2. Malaysia acceded to the Vienna Treaty on the 27th of July 1994. That document can be found at page 24 of our 2nd bundle.

Point no. 5: Now this Tribunal, having been established under Malaysian law, and notwithstanding the fact that it can sit anywhere outside Kuala Lumpur, this is provided in Article 3(2) of our Charter, has its seat in Kuala Lumpur, Malaysia - that is in Article 3 again of the Charter. It is therefore subject to Malaysian laws *when it sits in Malaysia*, as it is doing in the present case. Any treaty that Malaysia did not ratify, we submit, is beyond this Tribunal's jurisdiction.

Therefore, the Tribunal cannot apply any law that is not allowed by the Malaysian Federal Constitution, the supreme law of Malaysia.

I'm at Point 7 now. Article 4(1) of the Malaysian Constitution states that:-

"This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

Point no. 8. Article 160(2) states:-

"In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

"Law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;"

I move now to page no 3, point no. 9: “*Law*” is very specifically defined in Article 160(2) of the Malaysian Federal Constitution. That can be found at page 68 of the Amicus bundle. 1

A “*Treaty*” is written. A treaty only becomes “*written law*” after it has been ratified. 5

Point no. 11, the heart of the matter: From the list of Treaties that appear in the Prosecution’s Bundle Volume No. 2 – Statutes, *Malaysia has not ratified the following:-* 10

Item 1, which is the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984. The authority to support that proposition can be found at page 76 of our bundle. 15

Item 4 of the Prosecution’s Bundle, which is the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975. The authority for that proposition can be found at our bundle at page 74. 20

Item 13 in the prosecution bundle, which is Protocol I, Additional Protocol I of the Geneva Convention and that authority can be found at our bundle at page 111. 25

Item 14, Additional Protocol II to the Geneva Convention. That authority support for that proposition can be found in our bundle at page 117. 30

Item number 16, the Rome Statute of the International Criminal Court 1998. And that proposition is backed by authority at page 123 in our bundle. 35

Now items 6, 7, 8, 9, 15, 17 & 18 in the same prosecution Volume have no force in Malaysia as it is the laws of the United States.

I move now to page 4 of my submission. Point number 12: The conclusion that, we submit, is valid for this Tribunal to draw is that Treaties that have not been ratified, as listed 40

1 above, have no force of law whatsoever in Malaysia and
therefore should not be referred to by this Tribunal in any
way during the hearing of this case.

5 Point no. 13: Further, if we were to take the strict reading of
Article 4(1) and Article 160(2) of the Malaysian Constitution,
it would mean that if a Treaty is not ratified by Malaysia, it is
inconsistent, by virtue of not being ratified, with the
Constitution and is therefore VOID.

10 Point no. 14: An accused is entitled to have a fair trial "*according
to law*". I refer to the case of R v. Sang (House of Lords) [1980]
AC 402, specifically at page 437B which can be found at page
184 of our bundle, Volume 2. *In this instance, the trial is
15 within the geographical boundaries of Malaysia.* Therefore
Malaysian law applies. And if Malaysian law applies, then
those treaties, those treaties that were not ratified by Malaysia,
are out. They cannot be considered by this Tribunal. No
reference must be made to them by the Prosecution during
20 the trial of this present case.

Point no. 15: This position, we submit is bolstered by the
Malaysian High Court decision of Judge RK Nathan in the
case of Insas Bhd. v. Param Kumaraswamy [2000] 4 MLJ 727.
25 This can be found at page 268 in our bundle; where the High
Court in that case held that the opinion of the ICJ would bind
parties to the suit *only because* the defendant, the United
Nations, and the government of Malaysia (and as an aside,
the Plaintiffs there did not object).

30 The Court was, however, quite specific in its ruling that "*this
case should not be treated as a set precedent for all future cases.*"
That can be found at page 276 of that case. The Court was
quite clear that it disagreed with certain aspects of the ICJ
35 opinion, and was somewhat critical of the conduct of the ICJ
which gave a ruling that went beyond the question that was
posed to it by the parties. This particular portion of judgment
can be found at page 276 para G - I.

40 Point 16. Our submission is simple: Even when a treaty is
accepted by Malaysia, the High Court in that case of *Insas*
had made it very clear that it only applies because all the

parties agreed to be bound by the opinion of the ICJ. It left very open the question of what might have happened had one party *refused* to be bound by the ICJ's opinion.

Now, what more if Malaysia did *not* ratify a Treaty? In the case of Insas, the treaty that Malaysia had succeeded to was the Convention on the Privileges and Immunities of the United Nations 1946 on 28 Oct 1957. That is at page 280 of bundle volume no. 2.

Point 17. Our submission is therefore, Any Treaty not ratified, acceded or succeeded by Malaysia has no effect in a Court or Tribunal that sits within the geographical boundaries of Malaysia.

Point 18. We humbly seek a ruling from the Tribunal in the above terms to be given before the prosecution commences its case against the 8 Accused.

Thank you.

Gurdial Singh Nijar:

Your Honours, this is a rather serious proposition that has been put forward by the defence in an attempt to exclude certain critical Treaties that have made very clear that torture is an international war crime.

I have before Your Lordship, Your Honours, a written submission and I am going to raise 5 points.

Now the basis of the Defence contention is this: He says because we are incorporated here, because we are sitting here in Kuala Lumpur, therefore we can only apply the written law of Kuala Lumpur, of Malaysia; and we cannot refer to treaties, for example, International Law which have not been acceded to by Malaysia – I will not deal with this contention.

Our contention, the prosecution's response is that this is entirely misconceived. My learned friend referred to Article 1. The question is, "What law do refer to?" "Article 1". Now let's look at Article 1, which is at page 3 of this red book. Article 1 says,

1 *"there shall be hereby be established the Kuala Lumpur War*
Crimes Commission, the Kuala Lumpur War Crimes
Tribunal, the Kuala Lumpur War Crimes Legal team and the
5 *War Crimes Secretariat," and this is the important part,*
"whose functions and jurisdiction respectively shall be
governed by the provisions of this Charter."

10 It does not say, *"shall be governed by written law of*
Malaysia." That's an important point to remember. So let us
look at the provisions of this Charter.

15 Now the Commission investigates complaints, make
recommendations to the legal team and the Tribunal is the
legal arm of the Commission and the Prosecutor then refers
based on the recommendations of the Commission then
prefers charges and the Tribunal hears these Charges.

20 Now if you look at the preamble of paragraphs of the Charter,
now I invite Your Honours to page 1, we will see that this is
an International Body bestowed with powers to deal with
International Laws, all International Laws. Now, first we see
why this Commission and Tribunal were set up.

25 We look at the preamble of the first paragraph,

"Conscious that grave crimes continue to threaten the peace,
security and well-being of the world,

30 *Mindful that these crimes must not be allowed to go*
unpunished,

Determined to bring to justice the perpetrators of these crimes
and to prevent the repetition of such crimes in the future,"

35 and at the bottom,

"Reaffirming the Purposes and Principles of the Charter of
the United Nations, ..."

40 so there we have an international ... then because of all this,
we established an independent war crimes Tribunal over the
most serious crimes of concern and then the words are, "to

the international community. "That's at page 2, the 2nd preamble to the paragraph. 1

And then we want to resolve to guarantee lasting respect for enforcement of international justice. So, it is all about international law. It's not about where we sit and therefore that law will tie us down. That's a complete misunderstanding of the whole thrust and purpose of the setting up this International Tribunal. 5

My Learned Friend has said it depends upon where we sit and he acknowledges that we can sit anywhere. So if tomorrow we decide to sit in Afghanistan? Then we all change course and say, *"Ok now we leave Malaysian law behind and its contentions, correct? And now we start looking at Afghanistan law?"* 10 15

Because we could well have, for example, have a Tribunal to decide on the great crimes committed against the Palestinians. We might decide to hold it in Palestine. And then we shift course again? And forget about international law? Forget about Malaysian law? And then we start looking at the Palestinian law? So this is not what this is all about. 20

And we look at Article 4 which makes it clear. Article 4, which 25
at page 5,

"that the commission and the tribunal shall have an international legal personality"

And if we look at Article 2.1, page 3, the general objective of the commission is, 30

"To receive and investigate complaints from victims of wars and armed conflicts in relation to crimes against peace, war crimes, crimes against humanity and other like offences as recognized under international law" 35

And if you look at Article 2.2, specific jurisdiction is given to investigate crimes committed in various parts of the world – Iraq, Palestine, Afghanistan, Lebanon and other war crimes referred to by the commission. 40

1 And the crimes over which the Tribunal have jurisdiction include crime against humanity, which includes torture, as well as crime in violation of the Geneva Convention.

5 Now just because we set up, logistically, we set up the Foundation in Malaysia, we incorporate it, this is the administrative structure that we are setting up, to make it convenient, to make it legal to convene this so that we are not as some "motley crowd" as we ruled the last time, we are not a
10 "motley crowd." So this is just the administrative framework to have, to incorporate, to have a court set up here; but it does not govern the applicable law just because we have decided on where we wish to sit.

15 And the clearest example of this is the Nuremberg Charter. Now the Nuremberg Charter, at page 3 of my submission, paragraph 13; now that makes it very clear. After the Second World War, there was set up a Charter, there was agreed to a Charter to decide on the alleged war criminals. And this is
20 what Article 22 of that Charter said. Article 22 of that Charter said, and I quote from top of my page 4,

25 *"The permanent seat of the Tribunal shall be in Berlin. The first meeting of the members of the Tribunal and of the Chief Prosecutors shall be held in Berlin, in a place to be designated by the Control Counsel for Germany. The first trial shall be held at Nuremberg and any subsequent trials shall be held at such places as the Tribunal may decide."*

30 So that's exactly the point, that because they have decided that seats to be in Berlin, the first trial is in Nuremberg, does it mean that therefore that Nuremberg trial is limited to the law of Germany?

35 Indeed, that was the contention that was made by the Defence. They said, "You just judge us by the law that exists in Germany, the municipal law of Germany. Because the municipal law in Germany, Hitler's law, says you can do this, you can kill the Jews, you can do variety of things, you can abolish courts, you can impose
40 death sentence when and where you like?"

So they said judge us by the German law, exactly the submission that is being made. Because why? Because the seat is here. And what did the Court say? The Court rejected that. And if you look at my Bundle 1A, I invite Your Honours to page 694 of that Bundle.

[Registrar forwards the Bundles to the Judges]

Gurdial Singh Nijar:

No, that is the Defence Bundle. We need our Bundle. I think the wrong Bundle has been handed here and I apologise on behalf of the Registrar.

[Registrar forwards the Prosecution's Bundle to the Judges]

Gurdial Singh Nijar:

So my second point is that: Just because that is designated for administrative convenience, or for whatever reason, there is locus for the trial to be convened, that does not mean that that law of that administrative arrangement should adapt – that that law should apply and nothing else. That's my second point that I am making. And since the authority is not here, maybe I'll read it slowly. But it is in my Bundle 1A at page 694. It is the trial of Joseph Alstotter and if I invite Your Honours to look at the last paragraph at page 694, it starts with,

"In its judgement, the Tribunal dealt, inter alia, with the legal basis of the Tribunal and of the law which it applied."

So it is directly on point. And I now invite Your Honours now to turn to page 729. And at page 730, at paragraphs 1, 2, 3, starting with,

"We are empowered to determine the guilt or innocence of persons accused of acts described as 'war crimes' and 'crimes against humanity' under rules of international law. At this point, in connection with cherished doctrines of national sovereignty, it is important to distinguish between the rules of common international law which are of universal and superior authority on the one hand, and the provisions for enforcement of those rules which are by no means universal

1 on the other. As to the superior authority of international
law, we quote:

5 *If there exists a body of international law which, States,
from a sense of legal obligation, do in fact observe in
their relations with each other, and which they are
unable individually to alter or destroy, that law must
necessarily be regarded as the law of each political entity
10 deemed to be a State, and as prevailing throughout
places under its control. This is true although there be
no local affirmative action indicating the adoption by
the individual State of international law
International law, as the local law of each State, is
necessarily superior to any administrative regulation
15 or statute or public act at variance with it. There can
be no conflict on an equal plane."*

And then it goes on,

20 *"This universality and superiority of international law does
not necessarily imply universality of its enforcement. As to
the punishment of persons guilty of violating the laws and
customs of war (war crimes in the narrow sense), it has always
been recognised that tribunals maybe established and
25 punishment imposed by the State into whose hands the
perpetrators fall. Those rules of international law were
recognised as paramount, and jurisdiction to enforce them by
the injured belligerent government, whether within the
territorial boundaries of the State or in occupied territory,
30 has been unquestioned."*

And then, one very quick look at page 742, the 2nd paragraph,

35 *"The foregoing provisions constitute a sufficient, but not an
entire, answer to the contention of the defendants. The
argument that compliance with German law is a defence to
the charge rests upon a misconception of the basic theory which
supports our entire proceedings. The Nuremberg Tribunals
are not German courts."*

40 This Tribunal is not a Malaysian court.

"They are not enforcing German law. The charges are not based on violations by the defendants of German law." 1

We're not talking here about violations under the Federal Constitution. We're talking about international law, the Torture Convention, Geneva Conventions and so on. 5

"On the contrary, the jurisdiction of this Tribunal rests on international authority." 10

As the Charter makes clear, as I've read.

"It enforces the law as declared by the Charter and C.C. Law 10, and within the limitations on the power conferred, it enforces international law as superior in authority to any German statute or decree. It is true, as defendants contend, that German courts under the Third Reich were required to follow German law (i.e., the expressed will of Hitler) even when it was contrary to international law. But no such limitation can be applied to this Tribunal. Here we have the paramount substantive law, plus a Tribunal authorised and required to apply it notwithstanding the inconsistent provisions of German local law." 15 20

That answers, almost completely, in the voice of the Nuremberg judgment the contention by the Learned Counsel. That's my second point. 25

The third point is, actually, Your Honour, we have already decided this question before, as to the applicable law. If we look at the Advisory Opinion that was delivered by this Tribunal which, with respect, the Defence Counsel should have brought to the attention of the Court, it was held that *"the applicable law before determining cases for this Tribunal is International Humanitarian Law."* 30 35

And if you look at page 5, this is the Advisory Opinion of 31st October, in the Kuala Lumpur War Crimes Tribunal Report, I invite you to look at the report at page 5: The question there was, *"Can George Bush and his cohorts, can they exclude themselves from the force of the conventions like the Torture Convention and Geneva?"* 40

1 Could they do that? The court considered this and said, "*of course they cannot.*" And this is what the Court said, page 5, line 30 – this is what this Tribunal said,

5 "*We reach this conclusion from treaty law, case law and jus cogens in international humanitarian law.*"

The sources of International Humanitarian Law are set out.

10 "*The primary sources of international humanitarian law are treaties, customary law (jus cogens, state practice, opinio juris), case law and military doctrine contained in the field manuals and other military publications and regulations, International Courts, ad-hoc tribunals and commissions, and domestic courts all enforce and interpret international humanitarian law. The International Court of Justice has addressed International Humanitarian Law in a few of its judgments,*" and it goes on to quote.

The next paragraph says,

20 "*We will first examine the applicable case law in international humanitarian law for relevant legal precedence by which this Tribunal is **bound** in applying International Humanitarian Law to the instant Application.*"

25 And then the judgment continues to cite from a large number of sources of international law like the ICJ decisions and so on so forth. So that's very clear. We have legal precedent of this Court.

30 In case this is considered insufficient, let's look at the last hearing we had in respect of the first charge against George Bush and Anthony L Blair, which is also in the Kuala Lumpur War Crimes Report, and I refer to pages 97 & 98 where my learned friend, Defence Counsel, actually raised a more
35 fundamental objection as to the jurisdiction of this Tribunal and this Tribunal in ruling on that point made clear the basis of the jurisdiction – where is this derived from; and if I could invite Your Honours to look at page 97 of the Judgment of the
40 ruling that was made on 19th November by this Tribunal, last paragraph,

"On the issue of Jurisdiction, this is the unanimous view of the Tribunal. The Tribunal is of the unanimous view that it is exercising valid jurisdiction on the following grounds:

1. We are a legally constituted body because we are an organ of the Kuala Lumpur Foundation to Criminalise War which is a lawful entity under the Trustee Incorporation Act. 5
2. In the context of international law, the concept of law incorporates principles of natural justice and good conscience. This tribunal is a tribunal of conscience inspired by the highest ideals of natural law and justice. 10
3. Our charter is largely inspired by the Rome Statute. 15
4. We are guided by earlier precedents of tribunals of conscience in many other countries including Tokyo and Turkey. 20
5. Our inability to enforce a judgement does not affect our validity. All legal systems know of sanctionless duties and unenforceable rights 25
6. Are we usurping the functions of the United Nations? The answer is: We agree with the Counsel for the Prosecution that we are complementing the United Nations because of its inability to act in relation to the atrocities that are the subject of this proceeding. 30
7. Crimes against peace are the subject of the universal jurisdiction and this Tribunal in Kuala Lumpur is within its powers to adjudicate on crimes against peace. Further, our Charter allows us to conduct our proceedings in other countries that are the subject of the ICC 35
8. Finally, the Tribunal notes with regret the analogy drawn by the Learned Defence Counsel with 40

1 vigilante groups. This Tribunal is not a motley
collection of vigilantes but a tribunal of conscience
guided and inspired by the highest principles of
international law and justice."

5 Not limited by geographical jurisdiction where the court sits.
So on this point; we have the earlier decisions of the Tribunal
which makes it clear.

10 My next point, very briefly is, we are referring here to
universal crimes, and I am at page 5 at my submission at the
bottom, and in any event, these are universal crime based on
jus cogens and customary international law which pre-date
the Conventions. The Conventions, like the Torture
15 Convention, merely codify this and provided a machinery
point for enforcement.

20 So I will not labour this point except to say that in my
paragraph that follows, it is made crystal clear that torture as
a war crime pre-dates the Torture Convention. All that the
Torture Convention provides is machinery for enforcement,
but it re-states all the basic fundamental principle about the
fact that torture is an international crime. That is the point
that we are making.

25 So we can look at the Universal Declaration of Human Rights
which is in my paragraph 19. As of that date, the Universal
Declaration says torture is prohibited. And this is a UN
Declaration of Human Rights.

30 And if we look at the English House of Lords case where
another war criminal Pinochet was being arraigned for
extradition proceeding, the court said there very clearly, I
won't read it, it's just that I have got the Bundle 1A, I've got
the citation, but the prohibition against torture is **absolute**
35 there can be no derogation from it as it is accepted *jus cogens*
which means that it's norm of international law because every
country in the world agrees that torture should be a crime,
that it cannot be a state policy to commit torture. It cannot be
public official policy to commit torture.
40

So I quote in my paragraph 21 which is also the international criminal tribunal case for the former Yugoslavia referred to in Pinochet's case, it says that, therefore this *jus cogens*, this International Law, paragraph 21,

"enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules" and they said, "The prohibition against torture has now become one of the most fundamental standard of the international community." It is, "Without doubt, regarded by customary international law as an international crime."

At paragraph 23, in the word of the English House of Lords, I quote,

"The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal the torturer would find no safe haven."

And if you look at the Nuremberg Charter, it reaffirms the legal position that even prior to 1945, laws and customs regarding war were firmly established and universally recognized in international law. That's why there are the Treaties, State laws and practice.

And there was some doubt, Your Honours, about the judgement of the Nuremberg tribunal, it was a tribunal set up by the victors of the war deciding against the losers, the Germans, this doubt was put beyond doubt in my paragraph 25, I will lead to that, by the UN General Assembly on 11th December 1946, which is referred to in *ex-parte Pinochet*, where they adopted all the principles that were adumbrated by the Nuremberg trial and that brought forward this Article 5 of the Universal Declaration which makes clear,

"No one should be subjected to torture or cruel, inhuman or degrading treatment or 'punishment'."

My final point is that I think, with respect, with my learned friend Defence Counsel, he is reading the question of law very

1 restrictively because if you see what he says, the quotation
that he makes, in his submission at page 2,

5 *"... law includes written law, the common law, and insofar it
is in operation in the federation or any part thereof, and any
custom or usage that having the force of law in the federation
or any part thereof"*

10 So it is not just written law that has force in Malaysia, it is also
common law, which means the law as understood generally
and as interpreted as time to time by the Courts as well as
custom or usage having the force of law. Our courts have
15 always applied the common law, Your Honours here, some
of your Honours here been very distinguished members of
our judiciary, and they have always applied the common law,
not just written law.

20 And if we just look at examples at one of the cases, where the
issue was the natives, they wanted to have their rights that
have existed for time immemorial, as far as they were concern,
they wanted to have their rights recognized, the question is,
you just refer to the written law to see whether rights have
25 been accorded or can you establish by looking at the common
law as it were and looking at the right and this is what the
court said in acknowledging the existence of their right and I
refer to the case of *Adong Kuwau v. Kerajaan Negeri Johor*
[1997] 1 MLJ 418, and I invite Your Honours to look at page
428, before that, page 426, under the sub-heading *'Plaintiff's*
rights under Common Law'. And I read,

30 *"The study of native land rights shows that the common law
recognizes native land rights, even in countries practicing the
Torrens land system where the authorities issues titles
pursuant to statutory powers."*

35 So it is wider than just a written law, the National Land Code. And
then they quote this case, I won't read this case, US case, next US
case, then the following page 427, all common law jurisdiction,
Canadian case, Privy Council case, right at the bottom, the Privy
40 Council case, and so on.

At then at page 428, it summarises it, by saying this, at paragraph 3,

"This landmark case in which six out of seven Supreme Court judges found it necessary to go into the substantive issues of native land rights, held that common law categorily recognized native rights over their land."

And then at page 429, they relied on the Mabo case (No. 2), right at the top and then said that based on the development of the common law, and understanding what the common law is, said that courts can recognize rights, not just the written law.

And then at page 430, the court ruled that they have the right.

And at page 430, letter 'E' the Court concludes after looking at all this common law. And letter 'D',

"I believe this is a common law right which the natives have and which the Canadian and Australian Courts have describe as native titles and particularly the judgement of Judson J in Calder case at p 156 where His Lordship said the rights and which rights include '... the rights to live on their land as their forefathers had lived and that right has not been lawfully extinguished ...'. I would agree with this ratio and rule in Malaysia the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers."

So the essential point therefore is, and I conclude on this point, that if you look at our Charter, if you look at our own judgment, if you look at the Nuremberg judgment, even if you look at it narrowly from the definition, we are and should take into account all of international laws including treaties which we have not ratified.

So, with respect, I submit that the preliminary objection raised by the defence has no merits generally, or even on its own terms, and I do submit that it be rejected and we proceed with the trial. Thank you.

1 Jason Kay Kit Leon:

A short reply: I will take the Prosecution's point in turn in that objection.

5 Prosecution has said that our preliminary point, issue, is misconceived and he refers to the Charter that says the Tribunal is governed by the provisions of this Charter. When we look at administrative law, there's a parent act and there's a subsidiary act. The subsidiary act gets its authority from
10 the parent act. *This Tribunal exists because it was incorporated as a result of the Trustees (Incorporation) Act. Malaysian Law has relevance to the point on this. The Federal Constitution of Malaysia has relevance to this Tribunal.*

15 On the point that this point was already taken up in the advisory opinion, and the Learned Prosecution has referred to the advisory opinion, and also the preliminary ruling of the Tribunal in the first case, a different bench of course, and it is found at pages 97 and 98 of the reports. Now, by analogy:
20 ICJ decisions are merely persuasive. They are not precedents to the ICJ in later cases. Now, the decision of this Tribunal in the earlier case, in the first case, and even in the advisory opinions are the *soft laws* and therefore not a precedent for this Tribunal at this trial.

25 The ruling of the Tribunal in the first case found Bush and Blair guilty for crime against peace. The charge in this case is specific: That the accused persons have committed crime of torture and war crimes – different words. First trial – crime
30 against peace. It is a different set, and I will go directly now to Nuremberg.

I am so glad the prosecution acknowledges that Nuremberg was "*victors' justice*." I would actually go further and say
35 Nuremberg was "*victors' and victims' justice*" as Nuremberg was set up by the victors, the US, UK and Russia as well as France, the victim in World War II.

40 Allow me to refer to the report of the commission in trial No. 1 at pages 81 and 82. I am quoting from page 81, the final paragraph that was said by Judge Niloufer before she recused herself,

"In full view of international opinion at Nuremberg, the Allied powers, in an agreement drafted decided to try the leaders, including political and military, of the Axis powers. There were prosecutors in full military dress of the Allied powers addressing members of the Tribunal. And no issue of bias was raised. Judges were all from the Allied countries."

I skip to page 82, 2nd paragraph,

"Therefore, what I would like to advance is the objectivity of this Tribunal. To establish that we are different. Our Tribunal is different."

I reiterate points number 4 and 5 in my written preliminary issue with regard to the Vienna Convention which provides, if I may, *the baseline of how international law works* which states that *if a state does ratify*, I am simplifying here of course, *the treaty does not bind*.

By analogy, I also refer to Article 34(1) of the statute of the ICJ which only states,

"Only states may be parties in cases before the Court."

read together with Article 36(1), Statute of the ICJ again,

"The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

This gives a conclusion, I submit, that only where all parties accept jurisdiction would an International Tribunal have jurisdiction. I have received no instructions from the 8 accused and I believe there have been no communication whatsoever by the 8 accused with the Tribunal or its Registrar.

I am mindful of the judgment of the Tribunal in case No. 1 on the point of *in absentia* which can be found in the Tribunal reports at page 26 at the 2nd paragraph. I have only one thing to comment on this: **Tribunals of law are created by law**. If we were to say that good conscience, I am sorry about this,

1 that **good conscience** means **something** in law; then I respectfully submit *trial in absentia* does not sit too well, does not sit too comfortably, with the notion of good conscience.

5 There is nothing before this Tribunal to say that any of the 8 accused have agreed to accept the decision of this Tribunal as binding.

10 That is the extent of my reply. Thank you, Your Excellencies.

10 **Judge Lamin Mohd Yunus (President):**

We shall have a short adjournment and we will come back after lunch.

15 * * * * *

07 May 2012 – Session 2

20 **Judge Lamin Mohd Yunus (President):**

Ladies and gentleman, we had the submission from the defence and prosecution. It was the defence idea, and the prosecution, that I need to seek justice. I don't think we need to go around the world to look for the conscience. I think the statute is sufficient to apply for conscience and furthermore, torture is against the universal law. So therefore, you may proceed.

Francis Boyle:

30 Mr. President, distinguished Judges of the Tribunal, may it please the Tribunal. Before we call our 1st witness, I just want to make a brief opening statement for the prosecution.

35 We heard the debate this morning on the Nuremberg Charter, judgment and principles. As my co-counsel, Professor Nijar pointed out, there was a unanimous General Assembly resolution determining that the principles of the Nuremberg Charter and judgment constituted customary international law – and that was as of 1946.

40 And this Tribunal seeks to exercise universal jurisdiction under customary international law against these defendants.

And with respect to the ruling that you just made, of course 1
 Malaysia is not on trial here, and the government of Malaysia,
 and Malaysian officials are not on trial.

It's the highest level officials of the United States of America, 5
 former officials, the President, the Vice-President, the
 Secretary of Defence, and this whole gang of lawyers who are
 of disgrace to my profession as a Professor and lawyer in the
 United States of America.

Now, let me just review for you briefly then what the relevance 10
 of this Nuremberg Charter, judgment and principles are to
 what you are hearing during the rest of this week. Article 6 of
 the Nuremberg Charter, *"War crime, violation of laws or customs
 of war including murder."* These defendants had murdered 15
 Moslems, Arabs, Asians of colour.

"Ill-treatment": They have inflicted ill-treatment. These are 20
 Nazis crimes that these American defendants have inflicted
 on Moslems, Arabs, Asians of colour, *"or for any other purpose
 of civilian populations, murdered, for ill treating the persons of war,
 ponder wanting destruction etc."*

"Crime against humanity," mainly, murder which they have 25
 done.

*"Extermination conditions tantamount to enslavement and other
 inhumane act committed against any civilians population."* All 30
 prosecutions on political, racial or religious grounds.

That is exactly what has happened here. After the bombing of 35
 the Murrah federal building in the United States of America,
 the government of the United States did not go around and
 start torturing White-Anglo-Saxon-Protestant-Christian
 males. And yet after 9/11, these defendants went all over the 40
 world and proceeded to torture, murder, kill, incarcerate,
 disappear Moslems, Arabs, Asians – people with colour of
 the skin. This is what the Nazis did to the Jews – clearly not
 on the same scale, of course.

But materially, as a matter of law, these are Nuremberg crimes 40
 that you will be considering this week inflicted by white-

1 Judeo-Christian-American males against Moslems, Arabs,
Asian of colour simply because of who they are exactly what
the Nazis did to the Jews. And we are asking you to convict
5 them for the exact same reasons that Nuremberg convicted
the Nazis.

At the hearing of Nuremberg, Robert Jackson J, who had
stepped down from the US Supreme Court to prosecute these
defendants said, "we are setting up one standard of behaviour to
10 be applied not only to the Nazis defendants but also to ourselves,"
and a generation later, that is what we are asking you, the
judges of this Tribunal to do: To apply the exact same
standards of international law to these American government
officials that the Americans applied to the Nazis at
15 Nuremberg. No more, no less; but exactly the same, just as
Robert Jackson J said should be done in the future.

And despite the contentions of the Defence Counsel this
morning, all of the treaties that we are asking you to apply
have either been ratified, acceded to, or signed by the United
20 States government. There is nothing unfair with holding these
individuals accountable to treaties that were either ratified,
or signed or otherwise accepted by their own government.
This is exactly what happened at Nuremberg; when the
25 Nuremberg Tribunal held the Nazi defendants accountable
for violating the Calabrian Peace Pact of 1928 and the Hague
Regulations of 1907, both of which Germany was a party to.

We are asking you to do the exact same thing here that the
30 United States government did to the Nazis at Nuremberg
when it comes to these American government officials.

Article 6 of the Nuremberg Charter says quite clearly, and
our first advisory opinion says, "leaders, organizers, instigators
35 and accomplices participating in the formation or execution of a
common plan or conspiracy to commit any of the foregoing crimes
are responsible for all acts performed by any persons in execution of
any plan."

40 That includes all of these defendants, especially the lawyers
as well. They were all part of a conspiracy to torture, to violate
the Convention against Torture, to violate the 4 Geneva

Conventions of 1949, all of which the United States government is a party to. 1

Article 7: the official position of Defendants whether as Heads-of-State or responsible officials in government department shall not be considered as freeing them from responsibility or mitigating punishment. That applies exactly, that language, to Bush, Cheney, Rumsfeld, and all the lawyers involved. They all knew exactly what they were doing. Indeed, if you read the submissions by the Prosecution, they admit, they knew they were torturing, and they just did not care. 5 10

These defendant treated Moslems, Arabs, Asians of colour as if they were non-persons, outlaws, beyond the law, exactly what the Nazis did to the Jews; again, the scale was not the same, but the principles at stake are identical. 15

And finally, Article 8: The fact that the defendant acted pursuant to an order of his government or a superior shall not free him from responsibility. While the same applies to this argument that, well, *"My lawyer told me I could do it. My lawyer told me I could torture."* That's preposterous. Advice of counsel as a defence to war crimes that is rejected at the Justice prosecution at Nuremberg as well, as pointed out in our submissions. 20 25

These are serious crimes that you will be considering here for the next week. And there are principle that apply directly to these officials. We are asking you to apply the same standards and bodies and rules of law that the United States government has consistently applied since 1945 when it drew up the Nuremberg Charter, and up through, and including, today. 30

Thank you; and I hand the podium over to my colleague, Professor Nijar. 35

Gurdial Singh Nijar:

Thank you. I apologise for being absent short while ago. There was a TV interview which was being conducted and they just don't want to let me go. I apologize for that. 40

1 We are going to introduce, as I said earlier, we are going to
have 5 witnesses. And these witnesses, three of them are going
to be present in person. If I could invite Your Honours'
5 attention to this book called the 'Fact Book' which contains
the charges. I will state the order of which we propose to call
them.

10 **Abbas Abid** is the fourth name there at page 17, paragraph
14, who was detained, not in Abu Ghraib prison, but in another
Iraqi prison, a secret Iraqi prison. He will be our first witness.

15 And we also propose to call another witness, **Jameelah** from
Iraq. And we are tendering the amendment. And we propose
to amend the particulars of the charges to include her name
in the record as an amendment to our charge. We will make
that available in the best part of this morning, giving notice
of amendment to include the name of yet another person who
was detained.

20 The third witness will be **Moazzam Begg**, who is item 14(a)
who was detained, who was abducted in Pakistan, brought
to Afghanistan, detained in Afghanistan, and brought to
Guantanamo Bay.

25 And we will then also have 2 other statements that we will
seek to introduce into the record. But the witnesses are unable
to come. And that is of **Rhuhel Ahmad** of the United Kingdom
and **Ali Abbas** of Iraq. We have made strenuous effort for
their attendance. They have been so traumatized by their
30 experience that they simply cannot recount the infliction upon
them of the torture during those several months and years.

35 And so, we will making a plea, subject to what learned Defence
Counsel has to say, that those Statutory Declaration, these
are statements made on oath, and they would more or less
mirror the actual evidence of the other three witnesses who
are going to be produced in Court and who will be available
for cross-examination.

40 The first witness we intend to call is Mr. Abbas Abid. There is
no Statutory Declaration but we will be tendering a witness
statement and I seek the leave of your Honours to allow the

witness to testify in a sort of an *in cognito* manner, and I will explain the reasons for my request. 1

He lives in Iraq, he's going back to Iraq, and his evidence will show that he has been subjected to terrible treatment by Americans, by the Coalition forces in connivance with certain forces within Iraq itself. He fears for reprisals. So what we are asking is that, he will appear here, but he wants to cover his face with a kind of a scarf. We've tried various things, but it is, of course, subject to Your Honours ruling whether he is allowed to do that. He will be available, his witness statement will be read, he will be available for cross-examination but he wants to be *in cognito* as far as this trial is concerned. It is an unusual request, but this is an unusual situation. 5 10 15

Judge Lamin Mohd Yunus (President):

To cover his face, is it because of his health reason? Or because of his appearance? Or what?

Gurdial Singh Nijar:

No, it is entirely because of security reasons because he has to go back to Iraq and he fears reprisals. Once we hear his testimony, you will know why he's a very brave man to come and say this, and go back. 20 25

The other witnesses that we have, Jameelah for example, she's in Iraq. She has no problems because she lives in Syria, in Damascus now, and so she does not fear any reprisals.

Moazzam Begg is from the United Kingdom and he has appeared on television and so on so it's not an issue. But this gentleman Abbas Abid, we have a little problem. 30 35

Judge Lamin Mohd Yunus (President):

Alright, we'll allow it. 35 40

Gurdial Singh Nijar:

May the witness Abbas Abid please be called to the stand. Thank you.

Registrar Musa Ismail:

Bailiff, please call witness Abbas Abid.

1 **Abbas Abid:**
Giving oath in Arabic

Abbas Abid:
5 (Giving oath in Arabic)

Translator:
I, Abbas Abid, hereby faithfully take oath and swear that all
evidence that I shall give in the process shall be truth, and
10 nothing but the whole truth.

Gurdial Singh Nijar:
Mr. Abbas, thank you very much for willing to testify in this
case.

15 **Judge Lamin Mohd Yunus (President):**
Have you marked this document?

Gurdial Singh Nijar:
20 Yes, the document that I have here is a witness statement
which I have tendered and may this be marked after the
signing.

Judge Lamin Mohd Yunus (President):
25 It will be as the exhibit then?

Gurdial Singh Nijar:
No, this will be the witness statement because under the Rules
they are required to give evidence in the form of a witness
30 statement.

Judge Lamin Mohd Yunus (President):
Document marked as P-1.

35 **Registrar Musa Ismail:**
Mark this document as P-1. Witness Statement Abbas Abid,
P-1.

Gurdial Singh Nijar:
40 Thank you. Interpreter, have you got a copy?

- Translator:** 1
Yes.
- Gurdial Singh Nijar:** 5
Thank you. Can you just go through the first 3 paragraphs, his age, the fact that he's married, marital status and where he now lives? Can you translate that, No. 1 and 2?
- Translator:** 10
Yes, that is correct.
- Gurdial Singh Nijar:**
He confirms paragraph?
- Translator:** 15
He confirms paragraph 1, 2 and 3.
- Gurdial Singh Nijar:**
He confirms paragraph 1, 2 and 3, and for the benefit of everybody here: He is 48 years old, married, 3 sons and a daughter, he lives in Fallujah, a city in Iraq, subject of conquest by coalition forces. He is an electrical engineer and before his arrest, he was the chief engineer in the Ministry of Science and Technology in Baghdad. He's a very respected citizen. 20
25
Yes, tell us when you were first detained in paragraph 4.
- Translator:**
He was first detained on August 28th, 2005, around 10 pm. 30
- Gurdial Singh Nijar:**
And can he say where he was detained, initially, and later, paragraph 4.
- Translator:** 35
He was first detained from his house, and after that, he was transferred into a base nearby that was called "*Al-Muthanna*." He was detained there for 4 weeks, and then after that transferred to a secret prison called "*Al-Jadiria shelter*." 40

1 **Gurdial Singh Nijar:**

Paragraph 5, could you please read that to him and get him to translate it.

5 **Translator:**

In Baghdad, there used to be 5 shelters that were used for any nuclear attack. One of the used shelters was transferred into a secret prison that was called "*Al-Jadiria shelter*".

10 **Gurdial Singh Nijar:**

He told us earlier that on 28th August, 2005 about 10pm, there was a raid on your brother's house. That is paragraph 6. A combined force of American force and National Guard launched a raid on your brother's house. Can you confirm that?

15 **Translator:**

He confirms.

20 **Gurdial Singh Nijar:**

The second sentence, could you translate that for him? The force consisted of four American Humvees filled with American soldiers and twelve trucks loaded with Iraqi soldiers.

25 **Translator:**

He confirms.

Gurdial Singh Nijar:

30 More than 15 American and Iraqi soldiers entered the house in a terrifying manner. First, can you confirm this?

Translator:

He confirms this.

35 **Gurdial Singh Nijar:**

You said in a "*terrifying manner*". What do you mean by that? Can you clarify?

40

Translator:

They entered the house by smashing down doors and using sound bombs, and they would scream loudly terrorizing all those who were inside the house.

1

5

Gurdial Singh Nijar:

And who was inside the house?

Translator:

His brother's family.

10

Gurdial Singh Nijar:

At paragraph 7, you said your nephews came to your house crying for help. Can you translate that?

15

Translator:

He confirms that, saying his brother was absent at that time so he was called by his nephew to address the matter.

Gurdial Singh Nijar:

So you went to your brother's house and welcomed the soldiers and introduced yourself as the Chief Engineer in the Ministry of Science and Technology.

20

Translator:

Confirm.

25

Gurdial Singh Nijar:

And you told them that "my brother is not available for the time being and that I am ready to answer any questions?" You were entirely cooperative, is that right?

30

Translator:

Confirm.

35

Gurdial Singh Nijar:

Then they told me that they're searching the house, the Commander turned to a table in the living room that was used for studying by my nephews.

40

Translator:

Confirm.

1 **Gurdial Singh Nijar:**

And then they began to search the table and ask why there were so many holy books, too many holy books, too many Qurans.

5 **Translator:**

Confirm.

Gurdial Singh Nijar:

10 *"I told him that everyone in the family has his own holy book. He then examined some papers on the table which were articles downloaded from the internet from various sites some referred to the violence in Iraq, the future of Iraq and some referred to political figures like Ahmed Al-Jalaby."*

15 **Translator:**

So, basically, as the General asked, *"Why do you have so many holy books?"* Mr. Abbas replied saying that each member of the household owns their own copy of the book so that is why there is so many copies; and also the General discovered some articles on the table, plenty from the internet regarding political essays or regarding some political figures in Iraq.

Gurdial Singh Nijar:

25 So he confirms paragraph 9 of the witness statement?

Translator:

Confirm.

30 **Gurdial Singh Nijar:**

Paragraph 10, one of the soldiers whispered something to his ears, he came back and ask, *"What kind of a car is your brother driving?"* you told him the name of the car, it's in the father's garage, then he said they went to the father's house. They searched, found nothing. Then they told you to follow them for questioning. Can you confirm paragraph 10 and 11 please?

Translator:

40 He said yes, and he likes to clarify more. When they search the car, there was another car that belonged to me - they search that also, they ask, *"Whose car is it?"*. He replied, *"It's mine."* So, *"We would like you to come with us so we could ask you further*

questions." Usually, with each detainee, they would take his car with them. 1

Gurdial Singh Nijar:

So they brought you to the AL-Muthanna Brigade Headquarters for questioning." Can you confirm that? 5

Translator:

Confirm. 10

Gurdial Singh Nijar:

Now, can you read that part to him, slowly. The important part, paragraph 12, and confirm with him? 15

Translator:

He confirms. 20

Gurdial Singh Nijar:

He confirms. This is what you confirmed: *"They beat me up and demanded to know the names of "terrorists" in my neighbourhood. I told them that I did not know any terrorists. But they did not believe and continued to beat me. They even electrocuted me."* What do you mean by electrocuted. How did they do that? 25

Translator:

Basically, he was cuffed from the back. They brought a cord with a positive and negative charge, and they placed each one on his hands, one on left and one on right, and then after that it was connected to the power supply. 30

Gurdial Singh Nijar:

Just to get this correct: You showed just now your hands were behind your back. So they connected wires to your fingers, is it? 35

Translator:

Yes, one on the right and one on the left. 40

Gurdial Singh Nijar:

And then they pass electric current through the wires?

1 **Translator:**

The wire that they use, the cable that had already current in it. So as soon as they placed the wire, he felt the electrical shock.

5

Gurdial Singh Nijar:

What happen to you? How did you react?

Translator:

10

He said that the place that he was in seems to be new and not I quote "*a professional place for torturing.*" It seemed to be just happen right away, so they didn't have any proper equipment, as he said, for torturing but rather just to place the wires on his body right away.

15

Gurdial Singh Nijar:

Okay, so they have proper instruments for torturing, that's another thing, we will get to that. How did you react to that? I mean, just let us know. I have never been electrocuted in my life and this is some terrible experience you are talking about. How did you react bodily?

20

Translator:

You would turn into a *dancer*. You cannot react. All your senses would stop, and you would just shake.

25

Gurdial Singh Nijar:

So you just shake with the current that passes through you?

30 **Mr. Abbas Abid: IN ENGLISH**

Dancing.

Gurdial Singh Nijar:

Vibrating, yeah, vibrating. How many times did they do this?

35

Translator:

More than 3 times.

Gurdial Singh Nijar:

Than you say, "*They threaten to shoot me.*"

40

Translator:

And they would threaten that he will experience it again if he would not cooperate.

1

Gurdial Singh Nijar:

And then you said in your statement, "*They threatened to shoot me.*" Can you explain that?

5

Translator:

They would use an AK47. They would reload it while he was blindfolded so he couldn't see anything and they would shoot a round just close to his ears and threaten that the next shot will go straight to his head if he wouldn't cooperate. To clarify that, he heard the sound of an AK47 because it is a very common weapon that is used in Iraq so that is why by the sound of the reloading, he could determine that the weapon was in fact that an AK47.

10

15

Gurdial Singh Nijar:

Then you said "*The American army personnel in uniform took part in the torture.*" You saw them? Saw Americans in military in uniforms wearing American military uniform?

20

Translator:

There was a fault when they blindfolded his eyes - there was just some space beneath the eye, so he could see the bottom part of the feet and also the boots that were used and he could recognize the attire of American troops. Besides that, he could hear what they were speaking - confirming their nationality being Americans. And after the torture session was over, they would take off the fold, and then he would see that the troops are in fact Americans. And we would also address them, talk to them and they would reply.

25

30

Gurdial Singh Nijar:

Can you read paragraph 13 and get it confirmed please?

35

Translator:

Confirm.

40

Gurdial Singh Nijar:

Paragraph 14 and 15?

1 **Translator:**

He confirms the names of the detainees with him that was transferred with him to "Al-Jadiria" prison.

5 **Gurdial Singh Nijar:**

Paragraph 15?

Translator:

10 He confirms all of the points stated in paragraph 15 from (a) to (i).

Gurdial Singh Nijar:

15 Yes, just to quickly summarize. So, they tortured some of your cousins, to get testimony against you, and then they detained you at that same prison, that secret prison, for 4 weeks, and then they transferred you to this "Al-Jadiria" prison together with 7 other detainees and there, in "Al-Jadiria", he confirmed just now at paragraph 15.

20 I want to go through very quickly so that others would understand it. There, again, he was tortured with a wide ranging array and selection of very cruel treatments. Let me just re-confirm it: Electric shocks to various parts of your body, especially your penis. You have confirmed that, right?

25

Translator:

Confirm.

Gurdial Singh Nijar:

30 Hitting with tools (thick cudgels, cables, metal pipes, metal ribbons), forced you to drink a lot of water, mix it with a diuretic solution so that you gave to go to the toilet each time, and then tying your penis with a rubber band so that then you will be prevented from urinating, - as you have confirmed.

35

Then they hung you to the wall while hanging weights from your penis for long hours, threatened to sexually assault you, mess around with your sexual organs, and then they started shooting live bullets around, near, above your head, various parts of the body.

40

Then they brought your wife, your mother, to the prison and they told you they want to sexually abuse your wife and your mother. And during the investigation period, they gave you no food, no drink, except water which they mixed with this diuretic solution to make you pee very often and prevented you from peeing. Then they took out, forcefully extracted, your finger nails. How did they do that? What instrument did they use? 1 5

Translator: 10
They use pliers to do that. They use pliers to extract the finger nails.

Gurdial Singh Nijar:
Can you just show the judges those parts that have now grown back? Just from where you are. 15

[Witness shows to the Tribunal from the witness box his fingers.]

Gurdial Singh Nijar: 20
They then hung you from the wall for long hours and you fainted. And you describe the hanging method - by handcuffing my hands to the back, and then hang me up from the handcuff hands, until my shoulder got dislocated. Can you just demonstrate that? 25

Translator:
Do you like him to demonstrate?

Gurdial Singh Nijar: 30
Just demonstrate. Yes, just demonstrate what you mean by, *"hanging method from handcuffing my hand, the back, and so on."*

Translator:
He says that his mother and wife weren't actually present there but they threatened to bring them to the prison. But they weren't brought to the prison. 35

Gurdial Singh Nijar:
I see. We will rectify the record accordingly. This hanging from the wall for long hours until you fainted and dislocated, can you demonstrate that? 40

1 [Abbas demonstrates.]

Translator:

5 They would cuff him this position. Two soldiers would pick him up and put him on a chair. They would attach a chain to the handcuffs, which are attached to the arms, to his hands, and there was a hook in the ceiling of the room; and then they would attach the chain to the hook, and then they would pull the chain down, bringing him up to the ceiling. He would
10 stay hanging there. And around me there were more than 10 persons, each person was carrying a tool for torture, like a metal part, or wood, maybe sticks, some cables, some metal chains, some rubber cables, and each of these 10 were actively participating in the torture of Abbas; and they would hit him
15 in every part of his body and they would concentrate on his penis, and during this process, they would threaten to take off his underwear and assault him sexually.

Gurdial Singh Nijar:

20 Thank you. Can you translate paragraph 16 for him?

Translator:

Confirm.

25 [Abbas explains to the translator further details on paragraph 16.]

Translator:

He described that the detainees were used as an ashtray by those who are torturing them.

30

Gurdial Singh Nijar:

You have just confirmed that other detainees suffered from the following tortures: forcing the detainees to have sex with other inmates, their bodies being drilled with a "Black &
35 Decker" drill, cutting pieces of flesh from the body with a grinding machine, burning various parts of the bodies with cigarette and melted nylon, inserting solid objects in the rectum with wooden sticks, pipes, and a vacuum cleaner hose pipe, and made to stand for long hours. He's just confirmed
40 that.

Can you also ask him to confirm paragraph 17 and 18 please.

Translator:

He confirms point 17 and stating that until now he still does not know what he has signed. He confirms point 18.

1

Gurdial Singh Nijar:

Point 18, in a room 6 feet by 6 feet - smaller than the space here between this table and that, and a little here - in this small corridor room, you were there with 30 other detainees for 3 days? Are you saying that?

5

Translator:

Yes, confirm. For 3 days.

10

Gurdial Singh Nijar:

So, how did you sleep or defecate?

15

Translator:

He said that this room, the first one was just a temporary room where detainees were brought after being tortured. When the detainees are brought into the room, they are unconscious. It was just piles of bodies that would lay there. He doesn't recall much of the experience. He would wake up for maybe 10 or 15 minutes every few hours, and then he would faint again. He said that knew what he knows now *after* leaving that room, after meeting with other detainees and *they telling him* that where he was. He's saying that *most of the time that he spent there he was unconscious*.

20

25

Gurdial Singh Nijar:

And then he was moved to another bigger room, (7m by 3.5m), but then they put 70 detainees there, and later 115 detainees in this room. Is that correct?

30

Translator:

Confirm.

35

Gurdial Singh Nijar:

Can you translate: They put the bag over your head for over 2 months, and only removed it when he was given food? That's 19, in the first sentence.

40

1 **Translator:**
 Confirm.

Gurdial Singh Nijar:
5 And some prisoners will have a bag over their head for over 5 months?

Translator:
10 All the time that the detainees were there at that prison, they would be blindfolded or covered with a bag over their heads. From the first moment they entered the prison until they left, they were always blindfolded or covered with a bag. So that is why the persons that had the cover over their head for 5 months were actually there before he was, and for all of his
15 stay there for about 2 months he was covered with a plastic bag.

Gurdial Singh Nijar:
20 Now, at [paragraph 19] (a), *"There was not enough room for everybody, so the detainees were sitting and sleeping over each other and most of them suffered from burns, frictions and severe wounds, some of them were infected with contagious diseases like TB and scabies."* Can you confirm that?

25 **Translator:**
 Confirm.

Gurdial Singh Nijar:
30 Everybody had to urinate in plastic bottles placed near the door. Visits to the toilet were made once every 4 days only. Can you confirm that?

Translator:
 Confirm.

35 **Gurdial Singh Nijar:**
 And at [paragraph 19] (c), you say in your statement, *"We were separated in groups of 15 detainees. A detainee is allowed only 1 minute in the WC (toilet), and then he had to leave to let another one in. On any other occasion during the 4-days interval, we had to discharge our waste in the plastic bags given to us and right in*
40 *front of everybody. These bags were used to bring food and we kept*

them for this purpose. These toilet bags were placed near the plastic bottles at the door. Because it is so crowded, the bottles and bags got knocked over and the waste would be spread all over the room. Those bottles and bags were emptied once every four days when we went to the WC. Whenever we went to the WC and on our return, we would be beaten by the guards." Can you confirm that? 1 5

Translator:

Confirm. 10

Gurdial Singh Nijar:

Can you translate items (d) and (e) also?

Translator:

Confirm. 15

Gurdial Singh Nijar:

Item (f), "No medical care was available at all, and detainees were left to die from their injuries caused by torture. While I was at the prison, the following detainees died, namely, Alaa Khareeb Hassan, Mohammed Khadim, Husham Abbas, Omar Ali Mohammed, Khalid Younis Muhseen, Ali Farhan Mohamed, Waheed Mahmoud Abdullah, and Haitham Radhi." Can you confirm this? 20 25

Translator:

Confirm.

Gurdial Singh Nijar:

Paragraph 20, "Each group of five detainees was given a 2-litre bottle of water once every 2 to 3 days. When thirst become unbearable, some of the detainees drunk from the urine bottles in the room." 30

Translator:

Confirm. 35

Gurdial Singh Nijar:

Can you translate 21 and 22 please?

Translator:

Yes, confirm. 40

1

Gurdial Singh Nijar:

5

So, what you say in 22 is that they denied knowing about the tortures - American troops visited you all the time - that's what you're confirming isn't it? American troops knew of the fact of these prisons and these tortures.

Translator:

Yes, confirm.

10

Gurdial Singh Nijar:

15

And then on 5th September 2006, you were brought to a court, the judge there said you should be set free because there is no evidence at all against you. That's what you say in 23. Confirm?

Translator:

Confirm.

20

Gurdial Singh Nijar:

25

It was 5th September, but you were only released from the prison on 2nd October 2006, as you say in paragraph 24, and this is because you say, *"I had to pay US\$10,000 to the authorities in charge of the prison under the Ministry of Justice before I could be released."* And you were released about 1 month later. Is that right?

Translator:

Yes, confirmed.

30

Gurdial Singh Nijar:

35

And you were released together with 3 other detainees, in your case, at the prison gate, your brother was waiting for you, in his car, and he had to hire a group of police officers to secure you and ensure that you reached home safely. You asked the other 2 who were released with you to come, but they refused. 2 cars followed you, a BMW and a Toyota Crowne, both with black windows, but you managed to evade them.

40

Translator:

Yes, confirmed.

Gurdial Singh Nijar:

And those 3 other detainees who did not go with you, *"later I found out that they who were released with me were killed and buried at Al-Najaf cemetery, and their parents had to pay huge sums of money to reclaim their bodies for re-burial in Baghdad."* Confirm?

Translator:

Yes, confirmed.

Gurdial Singh Nijar:

I stayed for about an hour in my house, and then moved to another house to stay for a few days, and then I left my beloved country.

Translator:

Yes, confirmed.

Gurdial Singh Nijar:

Now you're back in Fallujah, as you said earlier on?

Translator:

Yes.

Gurdial Singh Nijar:

I consider my suffering as a test from God, which I've endured with patience. I still have pain in my shoulder and arms. I am unable to have children.

Translator:

Yes.

Gurdial Singh Nijar:

The 2nd last paragraph, *"I have nightmares all the time. I have terrible dreams of someone coming to capture me, sometimes to kill me, sometimes to harm my family, or being tortured all over again. I thought the nightmares will go away but they keep coming back. My family also has similar nightmares, soldiers capturing me, torturing me, harming me."*

Translator:

Yes, confirmed.

1

Gurdial Singh Nijar:

And your last statement ...

5 **Abbas Abid:**

Excuse me ... [adds a statement]

Translator:

10

When he got married, he wished to have 15 kids. And according to plan, he and his wife would conceive every 2 years from their marriage, so they were on the right track. Until the time that he was detained, and he was very happy to be released and he was overwhelmed by joy of the loved ones surrounding him by his release, but the worst thing that happened that made him lose all of his joy is the fact that he

15

left his wife pregnant at the time of his capture and that she actually lost the twins that she was pregnant with; and after going back to his previous life, he realised that his dream was shattered.

20

Abbas Abid:

No more child.

Translator:

25

He cannot have anymore children after the torture that took part on his body.

Gurdial Singh Nijar:

30

In your last paragraph, *"I'm giving evidence to tell the world that those who are cruel and inflict harm on other human beings should be brought to justice."*

Translator:

Yes, confirmed.

35

Gurdial Singh Nijar:

Your Honours, this is the statement as confirmed, and subject to the little change, I propose that this be dated and be signed by the witness in the presence of Your Honours.

40

[Abbas Abid signs the witness statement.]

Gurdial Singh Nijar:

You Honours, I offer the witness for cross-examination by the Amicus.

1

Judge Lamin Mohd Yunus (President):

How long will you take?

5

Jason Kay Kit Leon:

Due to the extensive testimony that has been given, cross, my questions, I wouldn't call them cross because I am Amicus in these proceedings; may I suggest they be taken after lunch? They will be quite long. Thank you.

10

Gurdial Singh Nijar:

Your Honours, just before then; there was a formal opening address, my Learned colleague addressed so well, and we want to enter this written opening address as part of the record, and I will make it available through the Registrar to the Court, with your leave. Thank you.

15

20

Registrar Musa Ismail:

All rise.

* * * * *

25

07 May 2012 – Session 3

Registrar Musa Ismail:

All rise.

30

Jason Kay Kit Leon:

May it please the Tribunal ... Mr. Abbas, good afternoon. We have heard your testimony this morning, and what I would like to do now, as a friend of the Court, is to ask you a few further questions, to clarify a few things that may have been quite unclear. If you are not sure of my question, or if you wish me to repeat, please indicate so. Is that alright?

35

40

Translator:

He says it is important to him that you be a friend rather than a foe.

1 **Jason Kay Kit Leon:**
I am a friend of the Court, and that is my formal designation.
We shall start off with some general questions. I pray the Court
5 for some leeway just for the first few questions.

Mr. Abbas, you are married now and you have 5 children?
And you said you want 15.

10 **Abbas Abid:**
Yes. I hoped so.

Jason Kay Kit Leon:
And unfortunately, that is not so. And some would say, having
15 5 children, you are very fortunate also.

Translator:
Each man desires what he likes.

20 **Jason Kay Kit Leon:**
How old are your children?

Translator:
17, 15, 13, 11, and 9.

25 **Jason Kay Kit Leon:**
When you were taken at the time, you were staying in your
own house. Was it in the city of Baghdad or Fallujah?

30 **Translator:**
In Abu Ghraib, it is a district between Baghdad and Fallujah.

Jason Kay Kit Leon:
And you were born in Fallujah, or somewhere else?

35 **Translator:**
Also in Abu Ghraib.

Jason Kay Kit Leon:
40 You were saying that on the night you were captured, your
brother's house was nearby. How far was the brother's house?

-
- Translator:** 1
Neighbour, door to door.
- Jason Kay Kit Leon:** 5
And what type of a house was it?
- Translator:**
It was made out of brick. 10
- Jason Kay Kit Leon:**
How many rooms in your house?
- Abbas Abid:** 15
I living with my father.
- Jason Kay Kit Leon:**
How many rooms were in your house?
- Translator:** 20
His father was living downstairs in the ground level, he and his brother were living on the second floor.
- Jason Kay Kit Leon:** 25
So you were living there with your wife and 5 children,
- Translator:**
His other brother, not the one who was in the other, a third brother. 30
- Jason Kay Kit Leon:**
So he was living one brother, and the brother whose house was attacked was ...
- Translator:** 35
There are four siblings. One of his brother is living in a house close by and the other 3 are living with their father.
- Jason Kay Kit Leon:** 40
So, you and your two other brothers, living with your father in one house? So, you, your wife, your five children, so, that's seven people.

- 1 **Judge Lamin Mohd Yunus (President):**
Counsel, I don't want to disturb you unnecessarily, but I think
you go direct to the point.
- 5 **Jason Kay Kit Leon:**
Alright, I will try. How many people were staying in your
house?
- 10 **Abbas Abid:**
My family, 7 persons. The other brother, 4 persons. Another
brother, 5 persons, and my father and mother.
- 15 **Jason Kay Kit Leon:**
So about 15 persons in the house. Big family.
- Abbas Abid:**
Yes. Big family. I wish it more than that.
- 20 **Jason Kay Kit Leon:**
Mr. Abbas, you are Muslim?
- Abbas Abid:**
Insya Allah.
- 25 **Translator:**
That's a "yes."
- Jason Kay Kit Leon:**
30 Are you from the Sunni school or the Syiah school, may I ask?
- Abbas Abid:**
Sunni ... [Abbas adds]
- 35 **Translator:**
He said this question regarding being a Sunni or Syiah was
only started to be asked here and maybe in the other parts in
the world only after the war.
- 40 **Gurdial Singh Nijar:**
Your Honours, I don't want to disturb his line of cross-
examination, but I think we are straying into areas which are

totally alien to the whole thing. Here's question of torture, 1
now we are going into profiling he's Muslim, not Muslim, so
I would like to urge that perhaps we should not get to this
area as the witness has said this is something that was imposed 5
after the thing, not trying to profile people, Muslim, not
Muslim, Sunni, not Sunni. I think we should really go to the
thrust of the matter which is whether or not there were these
inflictions of these torturous acts on them. Thank you.

Jason Kay Kit Leon: 10
Co-counsel for the prosecution brought up the issue this
morning in submission, "*Christian-Judeo*," and I was just trying
to establish ...

Mr. Abbas, you were an Engineer in Abu Ghraib. From which 15
University did you graduate?

Translator:
Rasheed University in Baghdad. 20

Jason Kay Kit Leon:
In what year?

Translator:
1988. 25

Jason Kay Kit Leon:
And thereafter, where did you work?

Translator: 30
Government post.

Jason Kay Kit Leon:
You continued in your Government post until the war? 35

Translator:
Yes.

Jason Kay Kit Leon:
So you worked with the government of Iraq at the Science 40
and Technology Ministry from 1988 until, what year did you
cease to be an Engineer?

- 1 **Abbas Abid:**
From 1988 to 2003.
- 5 **Jason Kay Kit Leon:**
The government of Iraq at this point from 1988 to 2003 was headed by one Saddam Hussein, yes?
- Translator:**
10 Yes.
- Jason Kay Kit Leon:**
I refer to page 1 of your witness statement when you said that on the evening of 28th of August, the American forces and
15 National Guards came and entered the house in terrifying manner. At this time, you were, of course, they entered your brother's house, that was next to you. So you were at your house?
- 20 **Translator:**
Yes.
- Jason Kay Kit Leon:**
So you only knew how they entered the house from what your
25 nephew told you. Your nephew was in your brother's house, yes?
- Translator:**
Yes.
30
- Jason Kay Kit Leon:**
So, whether they came in a terrifying manner, whether they screamed and smashed and there were sound bombs – it was
35 *what your nephew told you?*
- Translator:**
The sounds of the bombs that they used were heard from where he was staying and he said that his nephew have told him that the forces have smashed the doors and ...
40
- Jason Kay Kit Leon:**
But he did not see the forces smash the doors down?

- Translator:** 1
He didn't see the act of smashing because he was inside.
- Jason Kay Kit Leon:** 5
Thank you. Because it didn't make much sense ... I was quite confused.
- Translator:**
He said that his nephew has no reason to tell anything but the truth. 10
- Jason Kay Kit Leon:**
So the forces came and smashed into his brother's house. They smash down the door, they smashed down the window – what else did they do? 15
- Translator:**
The main door, the main gate, and a lot of windows, and some of the interiors, like tables and chairs, and so. 20
- Jason Kay Kit Leon:**
When he went there, they holding guns I assume? Were they holding guns when he went to his brother's house? 25
- Translator:**
Of course.
- Jason Kay Kit Leon:**
So his nephew came, and he told him the forces came and smashed down the house; of course, the nephew was in an agitated state, scared, yes? 30
- Translator:**
Of course. 35
- Jason Kay Kit Leon:**
How old was his nephew?
- Translator:** 40
He was born in 1989.

- 1 **Jason Kay Kit Leon:**
So, in 2005, he was 16?
- 5 And you went to your brother's house and *welcomed* the soldiers after they did this?
- Translator:**
It is not a welcome in that manner. It is just that we were
10 trying ...
- Abbas Abid:**
To deal with them.
- 15 **Translator:**
Try to deal with them in a more pacifying manner.
- Jason Kay Kit Leon:**
Negotiate with them?
- 20 **Translator:**
No. It's not a negotiation. He was trying to comprehend the shock, and he was trying to avoid any more damages that could happen.
- 25 **Jason Kay Kit Leon:**
Were you angry with them?
- Translator:**
30 No, he did not show any signs of anger but of course inside he was feeling a bit angry, yes.
- Jason Kay Kit Leon:**
You were afraid of the soldiers with guns?
- 35 **Translator:**
He said, "*What do you mean? How do you mean like afraid?*"
- Jason Kay Kit Leon:**
40 Soldiers with guns came and smashed down your brother's house, main gate and windows. You go there and what did you do? Were you angry? Were you scared? What were your feelings?

Translator:

Not fear, but inside anger that wasn't showed to the outside.

Jason Kay Kit Leon:

Of course you were angry. They just smashed down your brother's house. Did you show this anger to them?

Translator:

He said that it's not just a matter of smashing his brother's house. It's the entire occupation. This is just one page of what the occupation has produced.

Jason Kay Kit Leon:

I agree. But this was a very personal experience. Your brother's house was violated.

Translator:

He said that he was more concerned about his country, that it's just not a personal matter. It was a national matter.

Jason Kay Kit Leon:

On that night, were you concerned about your brother's children who were in the house?

Translator:

He was worried. He was not scared. He was worried about them.

Jason Kay Kit Leon:

Does he maintain paragraph 8, "*I went to my brother's house and welcomed the soldiers,*" or would he like to change that part to a more appropriate word?

Translator:

He said if to be changed, what kind of change will that be?

Jason Kay Kit Leon:

Did he welcome them and say, "*Peace be unto you, welcome to my brother's house – too bad you broke it down.*"

- 1 **Abbas Abid:**
When you say "Welcome" in Kuala Lumpur, it's different
when you say welcome in Iraq.
- 5 **Translator:**
He says it's a cultural difference when you say here and there.
It's not the same meaning.
- 10 **Jason Kay Kit Leon:**
Might I say he "*acknowledged*" their presence at his brother's
house?
- Translator:**
15 Yes. He said the entire occupation is the same matter.
- Jason Kay Kit Leon:**
The occupation resulted in him losing his position as Chief
Engineer. He lost his job after the occupation?
- 20 **Translator:**
He said, is it that relevant to today's case?
- Jason Kay Kit Leon:**
25 I am trying to test the veracity of his statement.
- Translator:**
Again, what does this got to do with that?
- 30 **Jason Kay Kit Leon:**
You lost your job. You have a big family, about 15 people
living in one house. How are you supporting them?
- Translator:**
35 He said, as a Muslim he believes that his wealth is managed
by God. But from 2003 and 2006, he still had a job in the
government and he only quit the job after he was detained in
2006 ... 2005.
- 40 **Jason Kay Kit Leon:**
2005.

- Translator:** 1
Yes, when he was detained in 2005.
- Jason Kay Kit Leon:** 5
When you were detained, you were brought to Al-Muthanna headquarters. Was this in Abu Ghraib or Baghdad?
- Translator:** 10
Yes, in Abu Ghraib.
- Jason Kay Kit Leon:**
And you were there for 2 weeks, 4 weeks?
- Translator:** 15
Yes for 3 weeks.
- Jason Kay Kit Leon:**
And then you were moved to Al-Jadiria prison for 2 weeks? 20
- Translator:**
No, in Al-Jadiria for about 6 weeks.
- Jason Kay Kit Leon:**
Now, that's where I am a bit confused. In paragraph 6, you 25
said, "*On the evening of 28th of August 2005.*" You were detained
on 28th of August, so that's the start date. I am now referring
to paragraph 24, "I was released on the 2nd of October 2006".
How long were you detained? 1 year, 2 months? 30
- Translator:**
He asked do you want the CV of the ...
- Jason Kay Kit Leon:**
How long was he detained, total? 35
- Abbas Abid:**
3 weeks in Al-Muthanna. 6 weeks in Al-Jadiria. And other
periods in Al-Tasfirat; 4 weeks with the Americans in Abu
Ghraib. Other periods in Al-Tasfirat prison. 40
- Jason Kay Kit Leon:**
Al-Tasfirat?

1

Translator:

It is a prison and it is called Al-Tasfirat.

5 **Jason Kay Kit Leon:**

There was one part of your testimony, that you said that the place Al-Muthanna, the room looked new, and it didn't look like a torture room.

10 **Translator:**

He said that this was actually camp before, or it was a base, and then it was transferred into a prison. So most of the buildings were not in a good shape and they brought him there. Is it not a matter of room that was different but that it's not as conventional torture room.

15

Jason Kay Kit Leon:

Did he see a torture room before he this when he was electrocuted? I believe the first thing that happen to him was electrocuted. Has he seen a torture room before that?

20

Translator:

What he meant was that they just took out a cable and then they applied it to him directly. And that he said that based on prior information that he took from previous stories that he read, in newspapers, or in books, or heard about and other source of media, he had established an idea of what a torture, process or a torture room might be; different from the one that he was in.

25
30

Translator:

So he knew about torture happening?

Translator:

Can you clarify?

35

Jason Kay Kit Leon:

Yes, I am sorry. He knew there torture rooms happening in Iraq?

40

Translator:

Before he was tortured?

Jason Kay Kit Leon:

— Yes.

Translator:

He said you are trying to establish a difference between ... leading to a question where you want to put the previous government and the one after the war ...

Jason Kay Kit Leon:

Yes, I will ask directly now.

Translator:

He is talking about these subject years after it had happened. During these years he knew by the numerous methods of media about the subject of this matter. He had no prior knowledge about different kinds of torture prior to that. He is not a man with authority or security to know these kinds of methods.

Jason Kay Kit Leon:

Was he aware of the previous allegations that the previous government of Iraq employed methods of torture?

Translator:

He said that this is irrelevant his case.

Jason Kay Kit Leon:

"Yes" or "no" please.

Gurdial Singh Nijar:

Your Honours, if I may, can I find out the relevance of this matter? Establishing knowledge in relation to historically? Here we are dealing very specifically with an allegation that at a particular point of time, he was taken and tortured. I would like to see what the relevance. I fail to see the relevance.

Jason Kay Kit Leon:

I will provide the relevance now. It is just to ask the witness, Mr. Abbas, when he was working as government servant from 1988 to 2003, that he was working for a government who employed means of torture, *did he take money from the*

1 *government* as wages, or his pay, salary. *Whether or not*
2 *there's an axe to grind with the occupying force* thereafter
3 which he alleges employed torture against him. If the witness
4 chooses not to answer, it is within his, I am alright with it.

5 **Translator:**

6 Is it a trial for the previous government? And if the previous
7 government was one of ill-manner, should the entire
8 population not work in different posts. Can you imagine a
9 country that without doctors, professors, or engineers, even
10 if the government was in fact ill-mannered as you pointed
11 out?

12 **Abbas Abid:**

13 Answer me!

14 **Jason Kay Kit Leon:**

15 You do agree that the previous government of Iraq could have
16 been better?

17 **Abbas Abid:**

18 I want an answer.

19 **Jason Kay Kit Leon:**

20 I am asking.

21 **Francis Boyle:**

22 Your Honours, if I may, the previous government of Iraq is
23 not on trial here and I don't understand what the relevance
24 this line of questioning is. The victim here is an Engineer who
25 worked for the government. There's no allegation at all that
26 he himself committed with any type of criminal activity. He
27 just had a job. So I would respectfully request that we simply
28 return to the allegations of torture and not raise questions
29 implicitly as to his credibility and integrity as an Engineer.
30 Thank you.

31 **Jason Kay Kit Leon:**

32 Very well, I will go to other aspects of credibility now.

33 Paragraph 12. Did you own a gun prior to you being taken in
34 2005? Let me just ask directly. How did you know that it was

an AK47? In relation to paragraph 12, you gave testimony to say that they reloaded an AK47 and shot around close to your ear. Are you proficient in guns to know how an AK47 reloads like?

1

5

Translator:

He said he served in the military. It was compulsory.

Jason Kay Kit Leon:

Thank you.

10

Translator:

He just wants to clarify that service in the military in the country was compulsory at the previous regime. Every man, if he was able should serve in the army.

15

Jason Kay Kit Leon:

May I know how long did you serve?

Abbas Abid:

More than two years and everyone should serve at least two years.

20

Jason Kay Kit Leon:

Did he volunteer to serve beyond two years? You said you served more than two years. Did you volunteer to serve after two years?

25

Translator:

No.

30

Jason Kay Kit Leon:

You have said ... I am curious as to how you identified the people when, you said the people who came to your brother's house on 28th August 2005, they were American Forces and National Guards. How did you manage to identify them as such?

35

Translator:

He said that it is very clear to differentiate between Americans and Iraqi forces based on their uniforms and the way they talked and the colour of their skin.

40

1 **Jason Kay Kit Leon:**
 So they were in uniforms?

5 **Translator:**
 Everyone.

Jason Kay Kit Leon:
 Let us go to paragraph 15, just a clarification. Paragraph 15(h):
10 Is it correct that the sentence should read "*Threatened* to bring
 my wife and mother to prison and sexually them" and not to
 actually do that. It was a threat to bring them to prison right?

Translator:
15 It was a threat.

Jason Kay Kit Leon:
 Were they actually brought to the prison?

20 **Translator:**
 No, it was a just a threat. They were not present.

Jason Kay Kit Leon:
 I just wanted clarification on that point. When you said you
25 were tortured and the various methods used, at paragraph
 15, did you see who were torturing you?

Translator:
 No.

30 **Jason Kay Kit Leon:**
 They put a hood on your head of course, and close your eyes.

Translator:
35 Yes, he was folded.

Jason Kay Kit Leon:
 So he couldn't see them.

40 **Translator:**
 He said he could see just beneath the folding, the boots and
 the bottom part of the legs.

- 1
- Jason Kay Kit Leon:**
- Were the boots or legs identifiable to show they were soldiers of which army? Or soldiers at all? Was there any way to identify the people who tortured him as nationality of any sort? 5
- Translator:**
- No, they were not wearing uniform. 10
- Jason Kay Kit Leon:**
- I move now to paragraph 21: There was guards in the prison, the phones with tones and songs in Iranian language. Was it possible that his torturers were all Iranians? 15
- Translator:**
- They might be, yes. He said that they might be Iranians, and they might be not Iranians but who would like to be Iranians. 20
- Jason Kay Kit Leon:**
- Further, there was in paragraph 21 or so: They would speak in a language that he did not understand. Of course, Mr. Abbas, you understand English. 25
- Translator:**
- He said yes, if they were speaking English, I would understand that. 30
- Jason Kay Kit Leon:**
- Yes, you have also answered me in English somewhat while I was questioning before. Now, of course, if they were speaking in language that you did not understand, they could be of a different nationality, which not necessarily Americans, correct? 35
- Translator:**
- He did not say that they were Americans. 40
- Jason Kay Kit Leon:**
- And he could not identify any of them? You were in a hood. 45
- Translator:**
- Yes.

1 Jason Kay Kit Leon:

Thank you. No further questions.

5 Gurdial Singh Nijar:

I just have one small clarification to make. From paragraph 21 to paragraph 22 following, you say, *"Yet in the media,"* they, meaning American troops, *"deny knowing it and deliberately try to give the impression that in this prison, only Iraqis are torturing fellow Iraqis."*

My question is: Do you have anything to clarify about the role of the Americans in inflicting the actual torture or participating in any way in the torture carried out by whomever.

Translator:

He don't have any info regarding whether those were American or not but during the 4 weeks that he stayed in the prison, Americans were present and they did know what was going on and what was happening. He said one time; they brought out the prisoners and lined them up in the hall to take finger prints, so he overheard a conversation between an American trooper, female, with one of the detainees. She said, *"Why do they smell so bad and why are they extremely filthy?"* She was not talking with the detainee but rather with one of the guards. So the guard replied after the question that, *"I'm not running a five star prison."* And that is one way that we knew that the American troops were present.

Gurdial Singh Nijar:

One last question: Did the Americans at any time intervene to stop the acts of torture that were being inflicted on you?

Translator:

On the contrary, in the first 3 weeks that he spent at the Al-Muthanna prison, they would collaborate with the guards and beat him up.

Gurdial Singh Nijar:

I have no further question but I believe Professor Boyle has ...

Francis Boyle:

Your Honours, after President Bush invaded Iraq, and we already dealt with that in the last proceeding, the United States government became the belligerent occupant of Iraq subject to the Hague Regulations of 1907 and the 4 Geneva Conventions of 1949; and our victim here was a protected person within the meaning of the 4 Geneva Conventions. In this capacity as a belligerent occupant, the United States government had an absolute obligation to make sure that any Iraqi forces did not torture anyone in their possession for any reason. This is the obligation of a belligerent occupant under the laws of war, even United States Army Field Manual 27-10. And also let me cite UN Security Council Resolution 1483 of 2003.

Jason Kay Kit Leon:

Is there a question to the witness or ...

Francis Boyle:

No, I'm not questioning the witness. I am following up with a statement as to the significance of his testimony. What was the responsibilities of the United States government to prevent the torture against this victim and that they failed and refused to discharge their responsibilities under Security Council Resolution 1483, the Geneva Conventions and Hague Regulations which means then the United States government was legally responsible for the torture that was inflicted upon this victim. Thank you.

Gurdial Singh Nijar:

Thank you Your Honours. That is all from this witness. May this witness be released? Thank you Mr. Abbas. You are excused. I am asking for the witness to be released from giving evidence today. We have nothing further, unless the court has any questions to ask. Can this witness be released?

Judge Lamin Mohd Yunus (President):

Yes, he is now released.

Gurdial Singh Nijar:

1 The prosecution's second witness is Moazzam Begg. His
Statutory Declaration appears in Bundle 3B but for the sake
of convenience, we have made available separately his
5 Statutory Declaration. For his testimony, we do not need an
Interpreter.

He is of UK citizen and speaks good English. He is on his way
from the witness room which is on the 4th floor.

10 Your Honours to save some time, can we can mark this
document that we intend to use? Could it be marked as P2
and to restate that it is dated 28th October 2009. The witness
will confirm that it is valid today as it was then in relation to
15 the event that happened and therefore will be consequential
amendments that, for example, that he was 41 years old – that
was in year 2009.

Moazzam Begg:

20 I, Moazzam Begg, hereby faithfully and solemnly takes oath
and swear that all the evidence that I shall give in this
proceedings shall be the truth and nothing but the whole truth.

Registrar Musa Ismail:

25 What is your age?

Moazzam Begg:

43 years old.

Registrar Musa Ismail:

30 Where are you from?

Moazzam Begg:

My nationality is British.

35 **Gurdial Singh Nijar:**

Thank you Mr Moazzam, you can take a sit. Mr Moazzam,
you have before you a document, which is the statutory
declaration that you had made in 2009. You recognised this
document?

40

Moazzam Begg:

Yes. I do.

1

Gurdial Singh Nijar:

And that on the last page, that is your signature, is it not?

5

Moazzam Begg:

Yes. It is.

Gurdial Singh Nijar:

Now, what I proposed to do is to get you to read your own document. Read it slowly because we are not as familiar with the facts that you are, of course, and secondly, at various point maybe you would like to clarify, or I will invite you to clarify for the purposes of this proceedings. Perhaps you can start off with I Moazzam Begg and so on.

10

15

Moazzam Begg:

I am Moazzam Begg, British Passport No. 464541423, of full age and a citizen of the United Kingdom do hereby solemnly and sincerely declare as follows:

20

I am 41 years old. I am a director of human rights organisation called the Cage Prisoners which advocates for people detained without charge or trial in the war on terror.

25

I live in Birmingham, England.

The purpose of making this declaration is to put on record my torture in Pakistan, Afghanistan and Guantanamo Bay.

30

In mid-2001, I went to Afghanistan with my family to build a primary school for girls. When the United States of America invaded Afghanistan on October 2001, I and my family evacuated to Islamabad, Pakistan.

35

On January 31, 2002 I was abducted from my house in Islamabad. At midnight I had a knock on the door and a group of men stormed in and pointed guns at me and also had electric Taser guns. They were wearing civilian clothes and did not produce any identification. They pushed me on my knees and shackled my hands behind my back and put a hood over my head.

40

1 They then stormed into the rest of the rooms the house and
took me to a waiting vehicle. In the back of the vehicle
someone moved my hood and photographed me. These men
5 were 2, and were Caucasian, and were American based on
their accent. One of them produced a pair of handcuffs which
he said was given to him by a wife of a 9/11 victim and he
handcuffed me with it.

10 They took me to a room and there were cells outside the room.
The Pakistanis told me they were doing this at the request of
the United States and that they did not want me for anything.

15 There were a series of interrogations in different locations
where I was interrogated by Americans who were in civilian
clothing. They questioned my presence in Afghanistan and
Pakistan. There were no specific allegations. On one occasion
there was a British man present who also questioned me about
my friends and my background.

20 Prior to my abduction, I had received a call from my friend
informing me that British intelligence had met him and asked
about me. I told him to give my telephone number to them.
From his description of the British intelligence officer it was
25 the same as the one who questioned me in Pakistan.

30 After being held for 3 weeks by the Pakistanis, I was handed
over to United States military custody in a military airbase in
Islamabad. The moment I was handed over the American, I
was shackled, hooded and choked and thrown to the floor.
And then they raised my arms from behind my back (this is
called the reverse-strapaddo technique) and carried me by
my arms into the plane while I was in excruciating pain and
screaming.

35 I was thrown on to the floor of the plane and strapped down
over the ankles and thighs. I was punched and kicked
throughout. A knife was put to my throat and I was threatened
that my throat would be slit if I spoke. Photographs were taken
40 because I could still sense the flashes of the cameras through
my hood.

I was then flown to Kandahar in Afghanistan and dragged out of the plane, thrown into the mud and kicked, punched, choked with my hood constantly around my neck and sworn at. I was taken to the processing area and one soldier put a knee on the side of my head into the mud while the other put his knee into the lower part of my back. I felt a cold steel of the blade that was being used to rip off my clothes. All of my clothes were removed.

They dragged me to a make-shift hangar lit with flood lights. They took photographs of me and brought dogs that were barking very close to my face. I was kicked and punched and verbal abuse that was racial, ethnic and religious was hurled at me. My hair and beard was shaved and I was again photographed. I was shackled at my feet and hands were tightly tied and my ankles begun to bleed.

They took me to a tent to be interrogated by 2 FBI interrogators who had FBI caps on. They asked me when was the last time that I saw Osama bin Laden and Mullah Omar. I responded in English and said I that I did not know anything about Mullah Omar or Osama bin Laden.

I was given clothes and kept in a cell made of coils of razor wire within the hangar. The process of removal from the cell for interrogation would have a soldier on over-watch putting a round in his chamber in his gun and pointing it at me while another would ask me to lie on the floor with my hands tied behind my back and 2 others would come in and shackle my feet and hands and place a hood over my head. Another stood outside pointing a gun at me. Then I would be taken in a bowing position to the interrogation. And on the way I would be punched and kicked and barking dogs were brought to my face. The interrogation would be done with me on my knees and hands tied behind my back.

These interrogations could last very short or they could last for 24 hours. Once I was asked to write my entire life story and then they tore it up once I finished.

I remained in Kandahar for about 6 weeks. During this time the British intelligence came me on 2 occasions. I was asked

1 about the list of Imams in Britain mosques and others. I felt I
was profiled and discriminated based on my ethnicity and
religion.

5 I was then moved to Bagram airbase detention facility which
was an airport warehouse. We were not allowed to talk, walk,
stand and any movement was prohibited. If anyone breached
the rule the person would be tied at the top of the door in the
cell and left suspended. I had been punished like this a few
10 times.

If permitted, I would like to describe this a little. There is a
film called *"Taxi to the Dark Side,"* which in 2008 won the
Oscar for best documentary. In it, there are interrogators who
15 speak of the Bagram detention facility and the death of a
particular taxi driver whose name was Dilawer. I used to see
Dilawer myself - his back was towards me. He was chained
to the top of the door with his hands above his head and wood
place above it. On an occasion when his body had slumped
20 for being hung up there for several days, the guards opened
the door and instead of administering him with the medical
treatment that he required, they begin to punch him repeatedly
and then they dragged his body away. What I learned later
is that this man died in American custody. He was one of two
25 deaths that I have witnessed with my own eyes in Bagram.

In Bagram I remained for 11 months. I was intensely
interrogated for a month in solitary confinement by the CIA,
by the FBI and US military intelligence and also by British
30 intelligence. My legs and arms were hog-tied behind my back
to my legs. During this period I was threatened to be sent to
Egypt.

Gurdial Singh Nijar:

35 Just a second, Mr. Moazzam. You used the word "hog-tied."
What is hog-tied?

Moazzam Begg:

40 Hog-tied is when your hands are tied behind your back to
your legs which are also shackled so in essence you're like an
animal that's just been captured from a kill. NI was in this
position during this period. And there's one more thing I think

it's extremely important for the purposes of this Tribunal to understand in relation to the greater war in Iraq and what followed.

I was threatened by the Americans, that if I did not cooperate, I would be sent to Egypt. They told me that the particular individual called Ibn al-Sheikh al-Libi had been seated the same seat as I was and that he was the senior Al-Qaeda member and that he didn't cooperate with them. So they sent him to Egypt.

In Egypt I learned later he was water boarded, tortured and abused in many other ways and he gave a confession and in this confession he said he was working with Saddam Hussein as a member of Al-Qaeda to attain weapon of mass destruction.

I learned later that in 2003, Colin Powell said to the United Nations, to argue for a case of war in Iraq that *"we have evidence, credible evidence based on the testimony of this man, Ibn al-Sheikh al-Libi, to invade Iraq."* And so, it was used as one of the testimonies, one of the evidences, to invade Iraq. And I say this because I was seated in this man's seat also.

Gurdial Singh Nijar:

And later that evidence was shown to be false?

Moazzam Begg:

That is correct. Ibn al-Sheikh al-Libi in year 2004, I believe, retracted that statement, but by that time the invasion had already taken place, and then interestingly, Ibn al-Sheikh al-Libi was after this sent to Libya, where he was a dissident, and in 2008 he turned up in his cell dead in the infamous Abu Salim prison. So it was a death of, what I believe, something was convenient. Just to also point out something that's very topical right now, an American soldier ...

Gurdial Singh Nijar:

Maybe you can read 20 first.

1 **Moazzam Begg:**

5 Sure. An American soldier told me that this threat, of being sent to Egypt, was not a joke and that this was done to another person who was sent to Syria. I make this point very clear now because of what's happening in Syria, is that I have met some individuals who were handed over by the United States to the Syrian government, so it show there was an intelligence relationship between the United States government and that of Syria and people were renditioned; in the case of Maher Arar ...

Gurdial Singh Nijar:

15 Sorry, just to clarify, you used the word "rendition", so this is the threats - to make this rendition to other countries where you will be tortured and face further consequences?

Moazzam Begg:

20 That's correct, and this is, of course, in the absence of the rule of law or any due process, and that's the important part, where a person would be literally taken away and then handed over to a country that's known to practice torture, that has been recognised as a practitioner of torture, and then left there at the hands of that country.

25 **Gurdial Singh Nijar:**

And you say this was practiced by the Americans? But you're a British. So, did the British intelligence play a part?

Moazzam Begg:

30 The British intelligence played an immense role. What's taking place now in Britain is in evidence of that, for the first time in British history, the British police are investigating the British government and intelligence services for complicity in torture. Last year, myself and several former Guantanamo Bay prisoners won an unprecedented out-of-Court settlement from the British government for a case of complicity in torture and false imprisonment.

40 So there is absolutely no doubt in my mind, and the minds of ordinary people, and also those who were affected by this policy, that our own government was completely in cahoots and in agreement with what was taking place; and that is why

inquires have been ordered by the British Prime Minister into the action of British intelligence in torture; and I believe that the latest case, which is extremely important, of a man called Abdel Hakim Belhaj, who is at present a military leader in Libya of the national transitional council who was rendered from Thailand to Libya with British and American complicity. And the proof for this have been found in documents that were discovered by the rebels who were in Libya and who had found documents which showed that British intelligence agents were communicating with Libyan intelligence agents in handing over and rendition of individuals.

Abdel Hakim Belhaj now has a case against the British government and is now in the courts. So this is extremely topical, and he, of course, later became, and is, one of the leaders of the Libyan revolution.

Gurdial Singh Nijar:

And this was through the cooperation of the then Prime Minister was it not? Rendition?

Moazzam Begg:

That's correct. It's believed that Tony Blair, Jack Straw and others were in charge at the time - they knew, or ought to have known, what was taking place under their watch. And that is what I believe the police are investigating, as well as through civil proceedings.

Gurdial Singh Nijar:

Just to inform you that Tony Blair in the eyes of this Tribunal is a war criminal, and so this is a very heartening piece of news that the British police are pursuing this. Thank you.

Maybe you can proceed with paragraph 21.

Moazzam Begg:

I had written some letters through the Red Cross to my wife and I did not receive any replies. And on one day during this period they brought photographs of my wife and children. They asked me if I thought I was ever going to see them again, and what did I think happened to them the night that you were abducted and whether they were safe. At the same time

1 I heard horrific screams of a woman and soldiers screaming
back profanities from the next room. They did not say it but
insinuated that it was my wife being tortured.

5 The CIA wanted me to work with them and the FBI wanted
me to be a witness for them about anything. I was willing to
agree to their demands as I had feared for my wife's well-
being who I thought, at the time, was being tortured in the
next room.

10 I was in Bagram till February 2003. During this period I saw 2
persons that were severely beaten by the US soldiers. Later it
was confirmed to me by Americans in Guantanamo that these
2 persons had died from their beatings, something that I've
15 already mentioned.

The conditions in Bagram were extremely poor. There was
no fresh food and no warm food. Food and water was limited,
and no tea or fruits. Medical care was dependent upon the
20 level of cooperation of the prisoners. Each cell was communal
with about 10 prisoners and we shared a bucket as a toilet.

Gurdial Singh Nijar:

How big was the cell, roughly?

25 **Moazzam Begg:**

I think it would be half the size of from here to there.

30 The stench was disgusting and there was no water to wash
with. We were taken for communal showers in a very
humiliating way, where we were all chained together naked
while some of the soldiers would put diapers, nappies, on the
heads of prisoners and have women soldiers present during
the showers. And then they would also take trophy
35 photographs.

40 In February 2003, I was taken to Guantanamo Bay. I believe
the journey was about 20 hours or so, or perhaps even more.
I was shackled in a 'three piece suit' of chains - and that is
something which is a chain around the waist which is
connected to the handcuffs, and then another chain that leads
from the waist to the ankles. A face mask was placed on my

face, blacked out goggles over my eyes and ear muffs over my ears. All of these appendages were very tight-fitting and caused excruciating pain. 1

The journey was very painful and I had to plead for a sedative from the soldiers which I was given, and hence when I woke up I awoke in Guantanamo in a daze. 5

At Guantanamo Bay I was taken to camp Echo which was maximum security and placed in solitary confinement, in a tiny cell where I remained for 20 months. 10

The cell was 8 foot by 6 foot. There was no natural light, no windows, no contact with any other prisoners. Although physical abuse was lessened, but the conditions were still brutal. 15

For example, I developed some medical conditions and was taken to camp hospital where one hand and one leg were shackled to the bed for days at a time. The recreation time allotted initially was 15 minutes twice a week with a series of armed guards with military dogs and their handlers all around me. I was designated a high value detainee because they wanted to process me through the military commissions and because I had witnessed, I believed, the beatings and the killings of 2 people in Bagram. 20 25

The same interrogators who threatened to send me to Egypt came to Guantanamo Bay 2 days after I arrived and asked the guards to leave the cell and produced a document for me to sign which was a confession that they had written that I was a member of al-Qaeda and that I was engaged in the war against the United States. I, of course, have never been to the United States. I was threatened that if I did not sign this document I would either face a summary trial which could result in execution and that execution chambers had been built in Guantanamo Bay, or that I would remain for decades in Guantanamo Bay without access to anyone or any legal process. 30 35

I signed that document and thereafter I was treated a little better wherein I was interrogated less frequently and was 40

1 abused less by the guards. But I remained in solitary
confinement.

5 My mental state was affected due to being placed in solitary
confinement. Having had no contact with my family all of
these years other than sporadic letters that were heavily
censored by the American authorities. I had been left in a state
10 of constant anxiety and despair. I had experienced several
anxiety attacks where I lost control of my senses. I would
scream, kick and punch during these attack - things that I
would never do normally do. A female psychiatrist once
suggested to me a method of suicide and asked if I have ever
15 considered removing my trousers and threading them with
the bed sheet to make a noose and to tie it around my neck
and then tying the other end on top of the cell and jumping
off.

20 Some drugs were prescribed to calm me down and to get me
to sleep. I do not know what these drugs were but I
experienced hallucinations when I took them as a result.

25 In November 2004 I was removed from solitary confinement
and placed in the blocks with other prisoners and 2 months
later I was released.

30 I never knew what my crime was to this day. I would never
understand the brutality or its justification. Perhaps the worst
thing was being in an environment where I had to prove my
innocence but there was no opportunity to do this. I believe
that it was by design to break my spirit by torturing other
people in front of me, which was worse than being tortured
myself. The absence of due process became worse than the
physical torture.

35 And I make this solemn declaration conscientiously believing
the same to be true and by virtue of the provisions of the
Statutory Declaration Act 1960. Moazzam Begg.

Gurdial Singh Nijar:

40 Thank you Mr. Moazzam Begg. Is there anything else you
wish to add?

Moazzam Begg:

The only thing that I would add is that what isn't mentioned in this story is the after-effects of this process. I have never imagined the United States to be a country that would behave in this manner having been born and raised in the United Kingdom, being brought up on a diet of American culture. When I first heard American voices, I actually felt, after being held by the Pakistanis, *"Finally the good guys are here."*

What I experienced over the next 3 years completely shattered that belief. I say often that I have never been to America, but America has been to me. And it has shown me a side of it which I never knew existed, and more importantly it has *"been"* to more other people. And I was held in Guantanamo and Bagram 3 years. Guantanamo is only opened 10 years later. Nine people had died in Guantanamo without charge or trial. There are several people who've had their arms and legs amputated in Guantanamo. There are children in Guantanamo who I saw first as children who've grown into adults 10 years later. My own wife is here, that same woman who I was led to believe was being tortured in the room next door.

Although we as former Guantanamo prisoners have managed to win a case against the British government, at least in parts, the United States of America, Bush and his cohorts, to this day, have not accepted responsibilities for anything. All of the hundreds of prisoners that were released, and it was said of us, at the time that, *"Guantanamo prisoners are the worst of the worst, the most dangerous people on the planet."* And if that was really the case, why is it that more than 600 of us were released?

There is no rule of law in Guantanamo. There is no rule of law in Bagram. There is no rule of law when it comes to the United States and its concept of justice when one is accused of being a terrorism suspect and we still carry the stigma of this accusation to this day as former Guantanamo prisoners because people don't believe that the most powerful democracy in the world could have held you without any good reason. They must have held you for good reason and it is impossible to shake off this allegation. And until someone is

1 charged and prosecuted successfully for what they did to us,
it's going to be very difficult for us to remove this from our
heads.

5 Gurdial Singh Nijar:

One final point is that you are now, you say in your opening,
*"I'm a Director of Human Rights Organisation called the Caged
Prisoners."* Can you just tell us a thing or two about that?

10 Moazzam Begg:

Yes, Caged Prisoners is an organisation that was campaigning
for me while I was still in Guantanamo. It hosted the largest
resource of prisoners held in Guantanamo and secret detention
in the world, I think, at a time. The reason why I join it is
15 because I recognised the absence of due process for all these
prisoners accused of terrorism or terrorism-linked.

Guantanamo, it must be said, is the tip of the iceberg. You
have to go through a process of secret prisons that make
20 Guantanamo looks relatively tame. And those secret prisons,
in some places I experienced, and yet I've spoken to people
who were in even worst places than that. The case I spoke of,
of Ibn al-Sheikh al-Libi is so imperative because it shows how
we use, how the West used this case of one individual to justify
25 the war in Iraq, and to take it to the highest level of
government. And it's these type of things that Caged
Prisoners, my organisation, tries to uncover.

People are often afraid of the intelligence services, they say,
30 *"They are watching us."* But at Caged Prisoners, we say, *"We're
watching them right back."*

Gurdial Singh Nijar:

Thank you very much Mr. Moazzam Begg. I have nothing
35 further to add. I offer this witness for cross examination. Thank
you Mr. Moazzam. Just maintain yourself there for cross-
examination. Thank you.

Jason Kay Kit Leon:

40 Good afternoon Mr. Moazzam. It's not really cross-
examination per se. I am not Defence Counsel at this point. I
am amicus curiae. I am a friend of the court. So I suppose my

task is to try to see if there are any further angles of your testimony that would be of use to this Tribunal. So, please feel free to ask me to clarify if you are unsure about the purport of my question. 1

You were at Guantanamo for quite a long time. During your stay there, you did make friends with some of the guards, yes? 5

Moazzam Begg: 10
That's correct.

Jason Kay Kit Leon:
Could you tell us a little bit about that? 15

Moazzam Begg:
Most of my time spent in solitary confinement and that means being in a tiny little room in which there is an even tinier cell. There is no vision outside of that cell except for what's immediately in front of you. And what was immediately in front of me were the guards, or the guard at any given time, that was tasked with watching me. 20

Some of these guards I got into conversation with and discussion with – this was against the rules. The crime would be "*fraternization with the enemy*" had they been caught. 25

So this is something that I did do and maintained relationships with some of these soldiers who would tell me how they disagreed with Guantanamo, disagreed with the war, were sympathetic to what was our plight, and I have still maintained relationships with some of these soldiers. 30

Jason Kay Kit Leon:
And these soldiers were Americans? 35

Moazzam Begg:
These soldiers were American soldiers.

Jason Kay Kit Leon: 40
Would you visit America now?

1 **Moazzam Begg:**

Let me just give you an example. I was invited to go to Canada about 5 months ago by the family of a young boy in Guantanamo who's still there, who's no longer a young boy.
5 His name is Omar Khadr.

When I first saw him in Bagram, he'd been shot in his eye. He had a huge exit wound from his shoulder and from his chest. He was 14 years old at the time. He's now 24 years old. He is
10 a Canadian citizen, the only Westerner left in Guantanamo. His family in Canada asked me to come and visit, as did the family of Maher Arar, who is the Canadian-Syrian, who was rendered from America to Syria and received a £10 million payout and an apology from the Canadian government for
15 complicity in torture.

When I arrived in Canada, I was greeted by police on the aeroplane who took me off the the aeroplane and told me that I cannot be allowed into Canada and they gave me a list and
20 a reason why: the first of which because I was a former Guantanamo prisoner – meaning that it was too close to come to America for Canada to let me in.

So although I would be ready to go to America and I have
25 done many video conferences with America, and Americans have come to my house, including former soldiers and guardsmen, I don't think that the gesture would be reciprocable right now.

30 **Jason Kay Kit Leon:**

Let's talk a little bit about Guantanamo. The conditions were, I suppose as you probably have said in the past, *"a bit better than Bagram."* Bagram was bad and Guantanamo was ...

35 **Moazzam Begg:**

That's correct.

Jason Kay Kit Leon:

Bagram was a prison. Guantanamo was a prison too.

40

Moazzam Begg:

Correct.

Jason Kay Kit Leon:

I do apologise. I supposed the elephant in the room right now is the question that I'm trying to ask but not ask. Please feel free to answer or not answer: Are you a member of Al-Qaeda?

1

Moazzam Begg:

The answer, of course, to that is: No, I'm not. And if I had been, I don't think that the British government would have settled with me out of court.

5

Jason Kay Kit Leon:

Just for formality sake: Were you a member of Al-Qaeda?

10

Moazzam Begg:

I have never been a member of Al-Qaeda, and never have been, and never will be.

15

Jason Kay Kit Leon:

We read from your declaration that you went to Afghanistan to open up a school for girls and that's basically where your testimony starts, and that's way into your adult life where you have married and you brought your children along with you to Afghanistan. Are you a teacher by profession, or could you tell us a little bit about your life before?

20

25

Moazzam Begg:

I had begun a project to build a school in Afghanistan – this was well before I went there. And what was very interesting to me was that at the time it was said that the Taliban did not allow education for females. The knowledge I had was to the contrary.

30

What I understood, and what later I practiced, was that they did allow female education – they just didn't want it to be done by particular Western nations. They didn't allow Western nations to maintain or dictate how they wanted to run their country. So it was clear that when I began this project we had permissions, we bought school equipment, computers, books, we had syllabuses, playground equipment, vehicles that would take girls from their homes to the school and back.

35

40

1 Also I was involved in a project to build wells in the drought-stricken regions of the north-west, and so that is something that I was involved in before I went.

5 **Jason Kay Kit Leon:**

And how many were with you in your project to build the school?

Moazzam Begg:

10 How many people? Numerous people.

Jason Kay Kit Leon:

Give or take about ...

15 **Moazzam Begg:**

You have to understand, people were helping from different parts of the world ...

Jason Kay Kit Leon:

20 Of course. But the actual physical persons that were there assisting you and your wife?

Moazzam Begg:

25 There were people running the school. There were teachers, about 20 or so teacher; there were caretakers, there was headmistress and so forth.

Jason Kay Kit Leon:

And funds were sourced from various sources?

30

Moazzam Begg:

That's right, yes.

Jason Kay Kit Leon:

35 Around the world?

Moazzam Begg:

That's right.

40 **Jason Kay Kit Leon:**

Again, another elephant in the room. Were any of those funds from Al-Qaeda?

- Moazzam Begg:** 1
If they were, I have no idea that they were. I just know that the funds were for the school. And the school was built, it was up, it was running. 5
- Jason Kay Kit Leon:**
And how long was the school in operation?
- Moazzam Begg:**
The school's in operation, I think, for at least 2 years or so, so about a year before I was actually there. And the school, I believe, was also hit by cruise missile and destroyed. Thankfully, no children were killed. 10
- Jason Kay Kit Leon:** 15
You are a British citizen, and so is your wife and children. You went to Afghanistan for this purpose, to build the school. And, of course, this was post-September 11. September 11 happened and then ... 20
- Moazzam Begg:**
No. I went there before September 11.
- Jason Kay Kit Leon:**
Then, September 11 happened. Were you aware of the news at that time? 25
- Moazzam Begg:**
About September 11? 30
- Jason Kay Kit Leon:**
Yes.
- Moazzam Begg:**
Not immediately because we didn't have a television, but I did hear on that there had been an attack on the United States. I just didn't understand it's magnitude or capacity until later on. 35
- Jason Kay Kit Leon:** 40
How did you keep up with current affairs? Shortwave radio?

1 **Moazzam Begg:**
Radio mostly.

Jason Kay Kit Leon:
5 You were aware that there were overtures being made to enter Afghanistan at the time, but you kept staying there?

Moazzam Begg:
10 For a few weeks we did. There was no evidence that the United States was going to do what it did. There was no evidence that they were going to be dropping 15,000 pound bombs on villages. There was no evidence that they were going to be firing cruise missiles or cluster bombs or phosphorus bombs. There was no evidence of this, so I felt relatively it was still
15 safe; people weren't leaving the country en masse, and they didn't until those bombs started raining down on our homes.

Jason Kay Kit Leon:
20 Was it too late to leave then?

Moazzam Begg:
No it wasn't, and we didn't.

Jason Kay Kit Leon:
25 Were you water-boarded?

Moazzam Begg:
No, I wasn't water-boarded.

30 **Jason Kay Kit Leon:**
You were born in the United Kingdom.

Moazzam Begg:
Yes, for my sins.

35 **Jason Kay Kit Leon:**
You spent the majority of your childhood there or ...?

Moazzam Begg:
40 Yes, I spent all of my childhood in the United Kingdom. I spent my early years studying at a Jewish primary school, and then later at a Christian secondary school.

- Jason Kay Kit Leon:** 1
Thereafter, what was your occupation, or did you study, what did you do after school?
- Moazzam Begg:** 5
I had various jobs. I studied law for a few years. I worked on humanitarian projects in Bosnia. I worked for my father. I worked for different organisations.
- Jason Kay Kit Leon:** 10
Your father was a banker.
- Moazzam Begg:**
That's right. 15
- Jason Kay Kit Leon:**
You did make a trip to Afghanistan before this school for girls' project? 15
- Moazzam Begg:** 20
Correct, I did.
- Jason Kay Kit Leon:**
Could you tell us a little bit about that? 25
- Moazzam Begg:**
Yes. I went in 1993 to Pakistan, and I went with the Pakistani group "*Jamaat-e-Islami*" which is the third largest political organization in Pakistan to Afghanistan where there was a camp there that was a training camp run by the Kashmiri militants and I visited there for about a week or so and I returned. 30
- Jason Kay Kit Leon:**
I do suppose you do realise that such visit would cause some question to be asked, and I'm sure they have been asked before. 35
- Moazzam Begg:**
They have been. But I know that this was something that I offered to the Americans and in their ignorance or, more disturbingly, in their knowledge when they wrote this 40

1 confession that they produced to me, they said that I visited
Al-Qaeda's "*Jamaat-e-Islami*" training camp. And this was very
purposeful, playing to an audience that would be ignorant,
5 especially in the United States, because Al-Qaeda is a name I
don't think anybody heard of in 1993, and certainly it's not
part of "*Jamaat-e-Islami*", and never has been.

Jason Kay Kit Leon:

You had a bookstore in Birmingham?

10

Moazzam Begg:

That's right.

Jason Kay Kit Leon:

15

For how long, and could you tell us about it?

Moazzam Begg:

I was involved in a bookstore for about 2 years before I left to
go to Afghanistan.

20

Jason Kay Kit Leon:

Was this a religious book store or ... ?

Moazzam Begg:

25

It sold Islamic books mostly, yes.

Jason Kay Kit Leon:

I'm moving towards the, of course, the incident where there
was a raid on the ... could you tell us about it?

30

Moazzam Begg:

In 2000-2001, there was a raid on the shop and they took away
some items, it was under the Terrorism Act at the time. They
returned those items afterwards. And I believe this was the
35 process in the end from the British intelligence services that
was handed over to the Americans that later justified what
they used to keep me in custody.

Jason Kay Kit Leon:

40

If you were able to step out from yourself, I suppose; see it as
a third person, your situation and your experiences and how
would it look to an American looking at your life?

Moazzam Begg:

Well I think clearly after September 11 happened, the United States needed to react. It needed to protect itself. It needed to secure the safety of its citizens and so forth. And in that regard, it would not be surprising to speak to someone like me or somebody in a similar situation.

However, as I've said before, I've never been to America. America has been to me. I didn't do anything to America and I have never been accused of having done anything to America. I've never harmed an American, but America has harmed me. And the evidence for that is in my children. My youngest child was born when I was still in Bagram prison. I saw him for the first time in my life when he was 3 years old. He didn't know what a father was, and I didn't know who he was until that age.

What justified the Americans to do this to me; to him, more importantly? What justifies them to do this to other people? If they wanted to speak to me, there is a process that the Americans claim to project to the rest of the world. That is known as "*due process*" and "*the rule of law*." If you want to speak to somebody, you can arrest them, you can come to somebody's house and ask to speak to them. You can try to engage in a discussion with them.

But what you don't do is tie them, punch them, kick them, rape them, beat them, abuse them, deny them access to legal process, take them to a place where the law does not apply, like Guantanamo - even though the law applies to an iguana which is a reptile that is protected under the Endangered Species Act, no human being who is dressed in orange is protected there under any Act at all.

So I could understand them wanting to speak to me, and a whole host of other people. But doing this ... if I was to have done that to an individual; if I decided as an individual that I want to speak to somebody, and I want to kidnap him, and I want to punish him and torture him, and then question him; I would be charged with all manner of crimes from false imprisonment, to kidnap, to torture and so forth. Just because

1 a State does it, it doesn't mean that they are immune from
prosecution, or they shouldn't be.

Jason Kay Kit Leon:

5 You were not raped at Guantanamo, right?

Moazzam Begg:

It depends on your definition of rape.

10 **Jason Kay Kit Leon:**

The normal definition.

Moazzam Begg:

15 Suffice to say that things were placed where they shouldn't
have been.

Jason Kay Kit Leon:

I just have few things for you to clarify, or confirm, or deny,
or extend upon.

20 The conditions of Guantanamo that were released by the
Department of Defence, and, of course, some may call it
propaganda, but since you have been there, perhaps you could
confirm or deny them.

25 Detainees are offered up to 4,200 calories a day. Food was ...
food was given every day to detainees?

Moazzam Begg:

30 I think it's important that when you're looking at Guantanamo,
you have to recognise that everything that's true today wasn't
necessarily true yesterday, or yesteryear, or 10 years before.
And we have to remember that Guantanamo has been in
existence for 10 years, a decade. Some of the people in this
35 room would have either been very young children when it
first opened. We can all remember what we were doing 10
years ago.

40 So all over this period, Guantanamo's gone through its worst
point to it's now better. And I want to just quote to you the
words of Malcolm X because it's really poignant here: "You

don't take a knife, put it in a man's back 9 inches deep, pull it back 2 inches, and say, 'We're making progress'." 1

What's happened with Guantanamo is precisely that. So when they say that people are getting more food now, that the conditions are better now, that's true. But we are talking about something that's historically happened. So historically, the conditions were bad. Historically, the conditions were cruel, inhuman and degrading; and they happened for several years before that change came about. 5 10

Jason Kay Kit Leon:

Only during the time you were detained there, when you were a detainee in Guantanamo, could you confirm: Was food sufficiently given to you? 15

Moazzam Begg:

Again it varies, from the early days to the later days. So in the early days it wasn't sufficient. In the early days it was often uncooked, often not enough. Often, being a Muslim, I didn't know if it was halal or not. Sometimes it was, we were given MREs, meals ready to eat, which are military ration packs, which were clearly haram, which were clearly not suitable for Muslims but we were given the choice of either eating them or starving. 20 25

Jason Kay Kit Leon:

But, of course, that would be the condition of "*darurat*" ... emergency. Would it fall under "*emergency*"? 30

Moazzam Begg:

I guess as being somebody who's never had to eat anything like that, it's a stark choice ...

Jason Kay Kit Leon:

Yes, of course. 35

Moazzam Begg:

... somebody presents to you a pork and says, "*You either eat, or you starve.*" And although the law of necessity does apply, it's one that I don't think anybody in this room has yet faced. 40

1 **Jason Kay Kit Leon:**

One of the things that was said is that there was an average weight gain for detainees. When you were released, did you gain weight or was it less or ...?

5

Moazzam Begg:

We didn't have the luxury of weighing scales as part of prisoner equipment, so I don't know how they came to that conclusion. I can only say that, of course, when I left Guantanamo, that you can see pictures of me, and you can see how I am now. There wasn't a huge difference, I'm not a very big person.

10

15

But the proof would be in many other people where you can see that they have lost more than half their body weight. It is true that there's some people have put on weight. But that is based on statistics of people, for example, who have had one leg amputated, that they can't walk, that they can't move, that they are in a tiny little cell where movement is restricted to 3 steps forward, 3 steps back. There is no other movement area. So in a place like that, you would put on weight because you can't exercise.

20

Jason Kay Kit Leon:

The call to prayer, was it sounded? Were there calls to prayer 5 times a day during the time you were there?

25

Moazzam Begg:

Well I would say "Yes," because if I called my own call to prayer, then I would be the one doing it. What I didn't know, however, especially in solitary confinement, is that, what the times were. So in the absence of natural light, which for years there was none in Camp Echo solitary confinement, I didn't know what time the prayer times were. I didn't know when Ramadhan came and went. I didn't know when Eid came and went unless there was a decent soldier who happened to tell me, despite the infraction of the rules.

30

35

Jason Kay Kit Leon:

Were there arrows pointing towards Mecca in your cell?

40

- Moazzam Begg:** 1
There were arrows pointing towards what we're told was Mecca.
- Jason Kay Kit Leon:** 5
How about dental, medical, psychiatric care. Were you given medical care?
- Moazzam Begg:** 10
I gave an example earlier on about psychiatric care. I've never needed psychiatric care until I went to Guantanamo. And I was visited there twice by psychiatrists, one who suggested to me a tangible method of suicide. And people in Guantanamo have *allegedly* committed suicide. 15
In terms of the medical treatment, there was medical treatment there. I still have a filling in my mouth that was given to me in Guantanamo. The way that happened was that I was taken and put into the dentist chair, my legs were shackled, my hands were shackled, my head was restrained, and then they 20
operated on my teeth. So yes, there was medical care, but that's the way in which it was conducted.
- Jason Kay Kit Leon:** 25
Books and television: Were those available to solitary confinement detainees such as yourself?
- Moazzam Begg:** 30
There was no television. There were some books. The books were mostly 19th, 20th century English classics, so I read more Charles Dickens there than I did anywhere else. But there was no current affairs information, there were no newspapers, there was no radios, no visits, no phone calls – none of those basic things that would be afforded to the worst of convicted prisoners. 35
- Jason Kay Kit Leon:** 40
Because they did say here the most requested book was Harry Potter. I suppose you wouldn't read it if you had to?

1 **Moazzam Begg:**

Yes, I have to admit, one of my admissions is that I did read Harry Potter in Guantanamo.

5 **Jason Kay Kit Leon:**

Which book? First, second, third?

Moazzam Begg:

10 This is some of the worst admissions I've ever had to make, but the first five.

Jason Kay Kit Leon:

15 I'm sorry. I'm not trying to make light of your experience Mr. Moazzam. I suppose for us who have, I suppose for many of us who have never been detained or been detained for such a long period, we would agree with your assessment that, *"if the Americans said you probably did something or they detained you, there must have been something to it."*

20 You are friends with some of the guards who are Americans till this day?

Moazzam Begg:

25 Yes.

Jason Kay Kit Leon:

30 Are you angry at America the country, or America the people? What is it that ... You do know you can't tar everyone with the same brush. It's not right. What would you ... how are your ... What are your thoughts? How are you thoughts on this?

Moazzam Begg:

35 Well, when I returned from Guantanamo my family told me that I've developed an American accent, which was, you know ... But in all seriousness, my feelings towards America are very mixed and ambivalent.

40 I do not agree and do not support in any way at all the use of terrorism to kill innocent people, whether that's by suicide bombers or by B-52 bombers. And I have seen plenty of that.

I have been under American bombs. I have seen the results of it. 1

Am I angry? I think if anybody wasn't angry, there'd be something wrong with them. A few weeks ago I met with the Deputy Under Secretary for Homeland Security of the United States of America and along his side was a former general, and both of these were appointed by President Bush. And the purpose of this was the, known as the "*Task Force on Detainee Treatment*" as part of something called the "*Constitution Project*". If I felt this sort of animosity, the one that you are suggesting may exist, towards the Americans, I wouldn't engage with such people, and if I did, then I wouldn't use that time to talk to them, if you understand what I'm saying. 5 10 15

Rather what I have been doing is, as I've said, I've invited Americans to my home. Some of those Americans who were responsible, or at least partly, part of the machinery that kept me away from my children. These Americans were in my house, meeting, and talking, and playing with. As I've said that I have, and we have, former Guantanamo prisoners, extended the hand of trying to understand to our American tormentors. But they have not yet found it within themselves to reciprocate. Even going to Canada, which is not America, is too much for them to accept. 20 25

So my thoughts, in relation to America and its foreign policy and what it's doing, is that I am ready to forgive any American who asks me for forgiveness for what they did to me. I have no right, however, to forgive on the behalf of anybody else they're still abusing. 30

Jason Kay Kit Leon:

We are responsible for our actions. One final question. I can't remember the origins of the quote, "*Where there's much hate, there was much love before.*" 35

I suppose the question that I am trying to ask is this: Do you identify with the fear that would produce a reaction that would say, "*Let's close an eye to torture,*" or, "*Let's not ask too much questions,*" and you know, that sort of thing. All this 40

1 happened after, of course, 9/11. Could you understand what
could have brought someone to have done that?

Moazzam Begg:

5 Are you talking about 9/11?

Jason Kay Kit Leon:

Er, no. Torture.

10 **Moazzam Begg:**

I've come across many people who I would regard as torturers
in my life. And I want to give you the example of one who
was given two nicknames in Bagram. He was called "*King of*
15 *Torture*" and "*Monster*". He's featured in the film called "*Taxi*
to the Dark Side," so what I'm saying to you here is checkable.

His name is Damien Corsetti. And he was responsible for the
interrogation of many people including one prisoner who told
me with his own mouth that Corsetti tried to rape him.

20 Corsetti, from Bagram, was sent to Abu Ghraib, and here's
the link: In Abu Ghraib, he was brought up for detainee abuse
against females. He was also present at the interrogation of
this young Canadian boy that I mentioned earlier on.

25 And in 2008, or 2007, I received a communication from his
lawyers asking whether I would be a character witness for
him in the abuse cases that he was facing, because he was
being charged with the abuse of detainees in Bagram and Abu
30 Ghraib. I later spoke to him, and I wrote an article about this
in the Boston Globe, an op-ed, and I said to him that, "*You*
must be responsible for whatever actions you've done but I know
that you didn't do this on your own. There was a system that made
you do this."

35 And at the same time, Corsetti said to me, "*Please forgive me.*
What I have become at Guantanamo was as a result of all of the
propaganda I was being fed by my superiors and by my country, by
my media and people in power. Meeting people like you has changed
40 *my life because I became one of the worst possible people and now I*
have done a 180 turn."

So, from his own mouth, and this is the mouth of a person 1
 who's in charge of interrogation in Bagram and Abu Ghraib,
 things I think you are investigating here, and whilst he says
 that he may have felt justified to do it in the beginning, he
 realised what he had become and now he's suffered a series 5
 of nervous breakdown as a result.

In a sense I was the former prisoner and he was in a stronger
 position than me. But we've come out with him weaker and
 me stronger. 10

Jason Kay Kit Leon:

Did you believe when he said that?

Moazzam Begg:

I can only take him to his word. 15

Jason Kay Kit Leon:

Did you become a character witness for him? 20

Moazzam Begg:

No.

Jason Kay Kit Leon:

Thank you Mr. Moazzam. No further questions. 25

Gurdial Singh Nijar:

I have just one or two clarifications. All these provisions of
 books, Charles Dickens and what have you. In your mind,
 did it extenuate the kind of barbarism, the acts that you have 30
 described? Did it attenuate for it in any way? Did it diminish
 it? Did it make it go away?

Moazzam Begg:

I again give the example of Malcolm X of a knife in a person's 35
 back 9 inches deep and pull it back 2 inches.

For the first year or so, there were no books. So we couldn't
 read anything. In Bagram, just to explain, we were in a
 communal cell, in Bagram, not in Guantanamo where it was 40
 solitary confinement. You were not allowed to stand up. You
 were not allowed to walk, or to talk, or to look at the person

1 next to you. If you did, you were unceremoniously taken of
the front of the cell, dragged and chained with your hands
above your head simply, even for reading the Quran, which
5 many Muslims would know would be the thing that gives
you the most solace, it's your book of belief. Even for reading
the Quran. If your lips were moving, it would be considered
an infraction of the rules and you would be punished for it.

10 As far as the books were concerned, it is true they gave us
books and it is important that I don't lie about this or
exaggerate. There's no need to exaggerate. The truth is enough
to condemn those who are condemnable. But it's suffice to
say that the reason why they gave us such books was in order
15 to keep us away from current affairs information to make sure
that our brains are not connected with anything that has to
do with our case, and that's why there were no newspapers,
no radios, no televisions, no visits, no legal representation
and this is a Court no legal representation at all for people
20 detained for at least 2 years and 8 months. And even after
that, the lawyers that came never took us to Court. They were
never able to take us to Court even though many *habeas corpus*
writs had been, and are still, to this day, produced in the
American courts - not one person was ever released from
25 Guantanamo as a result of any legal proceeding. The law
simply didn't matter.

30 So they gave us these books in order that we don't sharpen
our minds, that we are not given, afforded, the tools in which
we can defend ourselves. It was rather that we would
submerge ourselves into, although it may be very good
English or books depending on your attitude to literature,
completely irrelevant works. And any magazine that they gave
us that had maps, that had current affairs information, that
35 had relevant pictures to our case, were either torn out or
blacked out purposefully in order that we don't have the
knowledge to defend ourselves.

Gurdial Singh Nijar:

40 Thank you. One last question and that is: You've been asked,
"Can you identify with the fear, can you understand the fear of the
United States?" you know, they are entitled to take in people
like you, do anything they want with you, put you in a *"black*

hole", as you say, for as long as they want. What do you have to say about that, that you understand their fear, you know, there was a real fear?

Moazzam Begg:

I know exactly how many people were killed on 9/11: 2,976. And the reason I know this is because every single human being is accounted for. Every human being there counts.

And I was in Afghanistan when Operation Endure Freedom was first being carried out. And under the bombings of that operation alone, nobody knows how many people have been killed. Hundred, two hundred, thousand, ten thousand, fifteen thousand, doesn't matter – because they're Afghans. They are worthless people.

And so whilst I do understand the need for justice, which the Americans had the right to do, this wasn't justice, this wasn't even vengeance. This was unrelenting warfare that continued, and continues to this day. For the 2,976 people who died tragically on September 11th, how many tens of thousands have been killed? Nobody knows, nobody cares because, and this is the pun, nobody counts.

Gurdial Singh Nijar:

Is it not true that a lot of the people, I read in the TIME magazine, were delivered to the United States by bounty hunters?

Moazzam Begg:

I believe in my case, and through my investigation as a director of Caged Prisoners, hundreds, literally hundreds, and the largest number were handed over by Pakistan, and President Musharraf at the time, wrote in his own book, and we have the same publisher, that he received millions of dollars for the individuals that he handed over to the United States of America. I don't know exactly what the price was for me, but I do know that leaflets were dropped in which Donald Rumsfeld said that they are, *"falling like snowflakes in December in Chicago."* And these leaflets offered bounties of money to poor Afghan villagers and Pakistanis for anybody that they feel is a suspect.

1 And I came across individuals who were handed over to the
Americans by their own relatives in the belief that the
Americans would never oppress them – that this would be a
good way of making some money.

5 **Gurdial Singh Nijar:**

And the large bulk, if not the entire bulk, of those who were
detained were released without any charges ever being laid
against them – you included.

10 **Moazzam Begg:**

As I've pointed out, we have never been charged, tried or
convicted in any court of law. But what we have done is to
reverse, at least to show, that those who were complicit
including, sadly for me as a Briton, the British government,
15 that they were the criminals, not us; and that, in fact, torture,
cruel, inhuman and degrading treatment, false imprisonment,
kidnap, abduction are all crimes whether they are carried out
by individuals or States.

20 **Gurdial Singh Nijar:**

And this from, supposedly, the most civilised nation in the
world. Mr. Moazzam Begg, I thank you very much.

25 **Moazzam Begg:**

Thank you.

Gurdial Singh Nijar:

Your Honours, I've no further questions for this witness.
30 Thank you very much.

...

I have one other witness who will give oral testimony.

Judge Lamin Mohd Yunus (President):

35 How long will it take?

Gurdial Singh Nijar:

That witness is going ... well the only problem is that it is
going to be through interpretation. But if we have, I think we
40 can do some fast-tracking of that interpretation which we can
propose in chambers and discuss that.

The testimony is not long, but the problem is the interpretation, and it takes, comes back and forth. And this is also a statement made through statutory declaration.

1

Judge Lamin Mohd Yunus (President):

5

In that case, shall we do it tomorrow morning?

Gurdial Singh Nijar:

Yes, I'm obliged.

10

Registrar Musa Ismail:

All rise.

* * * * *

15

08 May 2012 – Session 1

Registrar Musa Ismail:

20

All rise.

Gurdial Singh Nijar:

May it please Your Honours, the Prosecution continues its case today by calling the 3rd witness, Jameelah Abbas Hameedi from Iraq. Before that we had on the 2nd of May, sent to the Registrar, as well as the Defence team, an amendment to paragraph 14 of the Charge and we have the amendment to add the new 14(e), as well as to add a new paragraph 16(e). These are particulars relating to the treatment received by the next witness and I pray that these amendments be allowed. I understand that ... I have been given an advance intimation of the fact that the Defence has no objection to the proposed amendments.

25

30

35

Judge Alfred Webre:

Counsel, I am speaking on a matter that has come to the attention of the Bench, and I am speaking on behalf of the Bench. Since we are now in the process of looking at the issue of amending the charges, we wanted to bring this matter to your attention.

40

1 We received this morning the transcript of the first day. I'm
not sure if you've been given a copy of that. At page 11, this is
in the transcription of Professor Boyle's presentation, and it
states, this is as to the theory of the prosecution's case.
5 Professor Boyle states, it's at the top of the first overlapping
paragraph of the last page,

10 *"Article 6 of the Nuremberg said..or conspiracy to commit
any of..crime by any or execution of any crime.. especially the
lawyers as well. They were all part of conspiracy, to torture,
to violate the 4 Geneva Conventions 1949 all of which United
States of America was a party to."*

15 Now, if we go here to the charges, page 16, paragraph 9, it
says, the first three named Accused persons were at all
material times superior and are in international law
responsible for the criminal acts of their subordinates as they,

- 20 a) **Authorised** the commission of acts in violation of the
said Conventions;
b) ***In any event they knew or had reason to know that their
subordinates were about to commit such acts or had done
so, and they failed to take the necessary and reasonable
measures to prevent such acts or to punish the perpetrators.***

25 And if you go to the paragraph right before paragraph 8 on
page 16, it says,

30 *"the lawyers, Alberto Gonzales, Counsel to the President;
David Addington, General Counsel to the Vice-President;
William Haynes, General Counsel to the Secretary of Defense
Rumsfeld; Jay Bybee, Assistant Attorney-General and John
Yoo, Deputy Assistant Attorney General, were complicit in
35 that they provided the legal opinions and justifications for
avoiding the obligations under the Convention Against
Torture thereby facilitating the implementation of torture and
inhuman conduct when it was plain that the advice they were
giving was erroneous in law. They knew that their advice, if
accepted would be acted upon."*

40 Now conspiracy, as we all know, is a very exact term under
the law. And we didn't know from Professor Boyle's opening

statement, and on the other hand, conspiracy does not appear in the charges, the word I believe, "connivance" appears, which a vaguer term and which could be vulnerable.

Is the theory of your case that the lawyers and their principals were engaged in a conspiracy, or is it that they facilitated the implementation of torture when it was plain, i.e. any reasonable person can state that their advice was erroneous and they know their advice, if accepted, would be acted upon?

It's not clear what the theory of your case is at this stage from the charges and from the opening statement. And since we're at the stage now where you're going to amend the charges, if you wish to amend the charges with regard to distinguishing between the principals and the lawyers, this would be an opportune time to do that.

Gurdial Singh Nijar:

Thank you very much. We will certainly do that. We will formulate the amendment before lunch and present it to the Bench.

I just wanted to say that it is also individual responsibility that we are attaching to each and every one of them. If we look at paragraph 7 of the Charge, at page 15,

"All the Accused persons are individually responsible for the crimes alleged against them under this charge. The accused planned, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of these crimes. None of the Accused persons personally participated in actual acts of torture and inhuman treatment of the victims but facilitated and directed the implementation of torture and inhuman treatment through issuing of memorandums, legal opinion ..." and so on

And then we deal with the lawyers at paragraph 8, and then we deal, at paragraph 9, command responsibility.

Judge Alfred Webre:

So, so, ... but you will have to prove intent with regards to the lawyers.

1 **Gurdial Singh Nijar:**

Yes.

Judge Alfred Webre:

5 So, this bring to a second question that has come to the
attention of the Bench. And we haven't seen your submission
yet, but since the right to a fair trial is central in international
law – some people say it's part of *jus cogens*, and some people
is not quite there, or is coming to be ... This is a very important
10 point as learned counsel Professor Boyle mentioned for the
legal profession itself.

Is the Prosecution planning to introduce the Zeliko
memorandum that was made public by the US State
15 Department about 3 weeks ago? The Zeliko memorandum is
a memorandum written by the deputy to the then Secretary
of State Condoleezza Rice in 2006? And the Bush White House
ordered that all copies be destroyed, and that memorandum
held that water-boarding and all such matters were in fact
20 illegal under US law, and three weeks ago for some odd
reason, although the Memorandum had been historically lost,
a copy was found and was released publicly. Does the
Prosecution intend to introduce that document?

25 **Gurdial Singh Nijar:**

We got hold of the copy just before the trial began and we do
intend to introduce it as part of the submission.

Judge Alfred Webre:

30 Okay good. So you will be amending the charges as to ... Do
you intend to proceed on the theory of conspiracy?

Francis Boyle:

35 Thank you Your Honours. Yes, I was quoting on Nuremberg
Charter Article 6 to deal with the lawyers.

Bush, Cheney, Rumsfeld are directly in the chain of command.
The lawyers are not. So what that means is that under
Nuremberg Article 6 the lawyers would qualify as, I've said,
40 "*instigators and accomplices participating in a formulation or
execution of a common plan or conspiracy to commit any of the
foregoing crimes.*"

So the lawyers would be both instigators, accomplices, aiders and abettors as well as conspirators with the principals. And as aiders and abettors, that makes them principals in the first degree.

My colleague, Professor Jordan Paust, and we will get this article for you, has, was a Judge Advocate General core lawyer during the Vietnam war in charge of investigating crimes prosecutions and he wrote an article in the Columbia Journal of International Law pointing out that all of the lawyers involved were, in addition, conspirators to violate the Geneva Conventions of 1949 and the US War Crimes Act of 1996. So the lawyers have more than one basis of accountability here. I thank you for bringing that to my attention.

But under Anglo-American common law, you could be both an aider and abettor, an accomplice, and a conspirator, and it's our position that the lawyers are all three. And that then makes you a principal in the 1st degree with Bush, Cheney and Rumsfeld who were directly in the chain of command.

As you know under Anglo-American common law, conspiracy is *"an agreement between at least two people to an illegal act, or an agreement to a lawful act by unlawful means."* And what happened in the Nuremberg Charter, if you read the history of the drafting of it, the United States government, that drafted the Nuremberg Charter, took the Anglo-American theories of accomplice liability, aiding and abetting and conspiracy, and put them into the Nuremberg Charter where they are today. Does that satisfy your concern? So, you would like a formal amendment to the charges to also include conspiracy?

Judge Alfred Webre:

Counsel, since you have raise that issue in your opening statement, it is an issue that you plan to include in your submission, and because of the reasons that you mentioned and we are now in a kind of house-keeping mode of amending the charges, I think that that would be very timely.

Francis Boyle:

Well, then we so move to amend the charges to include conspiracy, for all of them, and especially including the

lawyers, as defined by the Nuremberg Charter, judgment and principles.

Gurdial Singh Nijar:

And the other point that be made in regard to the lawyers is that we will be quoting a judge experienced in international criminal cases which has been interviewed by Philippe Sands, whose name is anonymous – his name has been withheld by request – and this effect is that, and I will be quoting this, *“the legal advisors, they have opened the doors of abuse or even torture in the use of techniques of interrogation on specific individuals, then in theory the responsibility will go back to the author of the legal advice on which the general counsel and the decision maker have relied.”*

In other words, there is principal responsibility. It goes beyond the question of, we do not have clearly to show that there was this enterprise and they were working in unison as it were. So I think the law since Nuremberg has moved on to say that you actually assume principal liability if you know that your advice is going to be acted upon. And it's not just a question on command responsibility because you submitted your memo to your boss and he acted on it and you knew he was going to act on it.

And this is a kind of a joint criminal enterprise. So we will also be relying on this concept of a joint criminal enterprise which was elaborated in the case, the International Criminal Tribunal for the ex-Yugoslavia where they said very clearly in their judgment, and I will be quoting in my final submission on this point after we have adduced the evidence,

“A joint criminal enterprise exists where there is understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be expressed, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime has been committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an

agreement formed between them then and there to commit a crime."

Actually we are going on beyond the question of a kind of conspiracy. In other words, I think on the basis of this law, because we do appreciate conspiracy would require a pre-arrangement, an understanding and the onus, as Your Honour has pointed out, for the ingredients is quite heavy.

So we wanted to rely on this line of authority to show very clearly they are principally liable – they knew what was going on and this amounts in international law, as established, to a joint enterprise which can be formed just by the fact of your memorandums and your advice being acted upon and continued to be acted upon. But we will deal with the conspiracy as well and formulate accordingly so at least it covers all our bases in accordance to the guidance provided by Your Honour.

The order in which we propose this morning is we will call the third witness *Jameelah*, and then we will read the *Statutory Declarations of the two others* whose names are particularised in the Charge, and then we will see what time there is in the morning and we propose to show the video that was referred to by Prosecution Witness number 2 Moazzam Begg called "*Taxi To The Dark Side*" because all that is being testified to, the kind of treatment, the context in which it arose, I think, as they say, "*a picture paints a thousand words*," and nowadays, you know, with videos it paints more than a thousand words – it's rather long but I think it's extremely edifying and quite critical to looking at what exactly is this torture that was going on, whether the American were involved, to what extent they were involved, and the extent to which this reached higher up in the chain, not just below the chain.

So, with your leave can I please call the first witness Your Honour? Jameelah.

Judge Lamin Mohd Yunus (President):

You will be relying on the Statutory Declaration?

1 **Gurdial Singh Nijar:**

Yes, we will be relying on the Statutory Declaration a copy of which will be furnished to Your Honour. Can this be marked as "P3"?

5 **Judge Lamin Mohd Yunus (President):**

Yes.

10 [Jameelah takes the oath in Arabic]

15 **Translator:**

I, Jameelah Abbas Hameedi hereby faithfully and solemnly take oath and swear that the all evidence that I shall give in this proceedings shall be the truth and nothing but the whole truth.

20 **Gurdial Singh Nijar:**

First, could you express the prosecution's gratitude to her, thank you very much for having come here to testify and relive some very terrible moments in your life.

25 **Translator:**

I would like to thank you all for your concern about this subject and what has been happening in Iraq this last years.

30 **Gurdial Singh Nijar:**

I will take you through your Statutory Declaration sentence by sentence. The 1st paragraph, 54, we have to change to 57 because now you are 57 years old?

35 **Translator:**

Confirm.

40 **Gurdial Singh Nijar:**

You used to be the Head Chief of the Cooperation Unions and this is the Cooperation Union that manages other government unions?

Translator:

Yes, that was my work previously.

- Gurdial Singh Nijar:** 1
And this was in Kirkuk prior to the invasion in 2003 by the coalition forces led by America?
- Translator:** 5
Yes
- Gurdial Singh Nijar:**
And because of your experience, you now live in Damascus, Syria? 10
- Translator:**
Confirm.
- Gurdial Singh Nijar:** 15
And you made this Declaration to put on record your torture, first at Baghdad Airport prison and later at the infamous Abu Ghraib prison in 2004?
- Translator:** 20
Confirm.
- Gurdial Singh Nijar:**
And in January 13, 2004 in the early hours in the morning, around 1 a.m., the American military broke into your house by force in Kirkuk? 25
- Translator:**
Yes. 30
- Gurdial Singh Nijar:**
You were very frightened? 30
- Translator:**
No. 35
- Gurdial Singh Nijar:**
The Americans rounded up the whole family including your daughter (22 years old)? 40
- Translator:**
Confirm.

1 **Gurdial Singh Nijar:**

Your son (17 years old), your nephew (25 years old), and a female guest (23 years old), and yourself?

5 **Translator:**

Confirm.

Gurdial Singh Nijar:

10 You were told that you were providing monetary assistance to the resistance and they wanted the money.

Translator:

Confirm.

15 **Gurdial Singh Nijar:**

They searched the whole house and found nothing except for 150 dinar which is something that you use for daily expenses.

Translator:

20 Confirm.

Gurdial Singh Nijar:

Then they tied your hands at the back with wires, very tightly.

25 **Translator:**

Confirm

Gurdial Singh Nijar:

30 And the soldiers dragged you by your hair out of the house and it was raining then, into the rain.

Translator:

Yes, it was in the house ...

35 **Gurdial Singh Nijar:**

And they took you out of the house and into the rain?

Translator:

Confirm.

40

Gurdial Singh Nijar:

Now this was er ... When was this? January 13th. January, that part of the world, it was winter. And you only had on your night clothes?

1

Translator:

Confirm.

5

Gurdial Singh Nijar:

And you say they destroyed everything in the house including the furniture, electrical appliances, everything in the house. All your belongings were destroyed.

10

Translator:

Confirm.

15

Gurdial Singh Nijar:

And you say also that they searched your family car, found a car battery charger, and accused you of using it to explode bombs. And then, they riddled the car with bullets and practically destroyed it.

20

Translator:

Confirm.

25

Gurdial Singh Nijar:

And then you say that your head was covered with a hood, they covered you with a hood, and you felt you could not breathe; in fact you felt you thought you were going to die because that hood was covering your head.

30

Translator:

Yes it was bad.

Gurdial Singh Nijar:

And then you said you were pushed into the military vehicle, you know the ugly ones they use, the Hummer. You were kicked by the Americans. Kicked like an animal, you said.

35

Translator:

Confirm.

40

1 **Gurdial Singh Nijar:**

And then, Puan Jameelah, you say about 20 minutes, or some period of time, just an assessment, in the vehicle you were then pushed out, and then you felt the road; or pushed onto the road, from a vehicle.

Translator:

Confirm.

10 **Gurdial Singh Nijar:**

And then you say you were dragged on the paved road, and after awhile, onto a cemented floor. You were dragged?

Translator:

15 Confirm.

Gurdial Singh Nijar:

When you say drag, what did you mean by "drag"? Can you elaborate?

20

Translator:

After about 15 minutes, we were driven by this Hummer, and I was tied up inside, and we taken to air-force by the military,

25 **Gurdial Singh Nijar:**

Just a second, I just want you to explain when you said "drag". What do you mean? Just to explain that one.

Translator:

30 I was dragged out from the Hummer, and the person was dragging me so strongly, and I can feel the road, the paved road all the way to inside the military base. I wasn't wearing any shoes at that time. Just sleeping clothes.

35 **Gurdial Singh Nijar:**

Okay then, Paragraph 9 you say, just before that, you were left standing on the wall for sometime. Then your hood was removed and you saw that you were in a big hall, no windows except for a window in the ceiling.

40

Translator:

Confirm.

- Gurdial Singh Nijar:** 1
And then you were asked 2 questions: Your name, date of
birth by an American soldier. You requested could your hands
could be untied because you were in pain. He refused, and
remained standing facing the wall. 5
- Translator:**
Confirm.
- Gurdial Singh Nijar:** 10
You realized you were in Kirkuk military airport at that time?
- Translator:**
Yes. 15
- Gurdial Singh Nijar:**
Then they put a hood again on your head. They dragged you
to another room.
- Translator:** 20
Confirm.
- Gurdial Singh Nijar:**
Then they removed your hood and you saw an American who
was in civilian clothes together with another Arab looking 25
man who spoke Arabic?
- Translator:**
Yes, and translated. 30
- Gurdial Singh Nijar:**
And then the American gestured you to sit on a chair?
- Translator:**
Confirm. 35
- Gurdial Singh Nijar:**
You requested your hands to be untied?
- Translator:** 40
Confirm.

1 **Gurdial Singh Nijar:**

And then you were told if you keep repeating this request for your hands to be untied, you will be slapped and thrown on the floor.

5

Translator:

Confirm.

Gurdial Singh Nijar:

10 The American then asked questions that were personal, and your relationship with the Baath party.

Translator:

Confirm.

15

Gurdial Singh Nijar:

He told you that they were accusing you of being part of the resistance, assisting, funding the resistance.

20 **Translator:**

Confirm.

Gurdial Singh Nijar:

25 You told them that you are not part of the resistance nor are you assisting the resistance. And you told them that nothing was found in your house when it was raided and destroyed. The Arab man then slapped you across the face. It was stinging and burning sensation in your eyes and your face. The interpreter said that this is just the beginning if you do not
30 cooperate.

Translator:

Confirm.

35 **Gurdial Singh Nijar:**

And then he told you, he said, you will face worse things that no one has seen or heard about. At that time you were more concerned about your daughter and the other female guest.

40 **Translator:**

Confirm.

- Gurdial Singh Nijar:** 1
Can you interpret paragraph 13? Confirm?
- Translator:**
Confirm. 5
- Gurdial Singh Nijar:**
Then all throughout, you were not allowed to go to toilet, no drink, no food was given to you? 10
- Translator:**
Confirm.
- Gurdial Singh Nijar:**
Then you say, 3 days later, this will be January 16th, an American soldier put a hood on your head again and dragged you into the open air. 15
- Translator:**
Confirm. 20
- Gurdial Singh Nijar:**
It was very windy you say, and the hood flew off and you saw the rest of your family. 25
- Translator:**
Confirm.
- Gurdial Singh Nijar:**
And you became very emotional because you felt all this that they were enduring was because of you. And your family tried to comfort you. 30
- Translator:**
Yes. 35
- Gurdial Singh Nijar:**
And then there was Iraqi interpreter there, you asked him, *"Look, look upon me as your mother. And this female guest who was in our house, can you please contact her family? Let them know where she is."* 40

1 **Translator:**

Yes.

Gurdial Singh Nijar:

5 Then two helicopters came with a few American soldiers and they put your son, your nephew and yourself in one, and the girls in another helicopter.

Translator:

10 She wants to clarify that the nephew is her brother's son.

Gurdial Singh Nijar:

Now the helicopter windows were wide open; it was winter, it was very cold. You asked whether they could be closed.

15

Translator:

It was open and it was very cold.

Gurdial Singh Nijar:

20 And the soldiers said, "*No, this will not be done because this will avoid any attack by the resistance.*" You were placed there. They told you that if the resistance shot at the helicopter, then they would be killed.

25 **Translator:**

They were afraid from the resistance.

Gurdial Singh Nijar:

30 Then you were flying for few hours and you thought you were being taken very far away. When you landed you did not know where you were. Then your hoods were taken off and you saw American soldiers who expressed surprised to see your condition – you were wearing your night clothes, no shoes, all of you.

35

Translator:

Confirm.

Gurdial Singh Nijar:

40 You also met your daughter and the female guest at the same place. Then the three of you were placed in the cell together. Your hands were untied.

- Translator:** 1
Confirm.
- Gurdial Singh Nijar:** 5
You had not been fed for 2 days. You were not allowed to go to the toilet at all. You were in a tiny wooden cell, no windows. And you were informed by the guard, when you asked, that this was Baghdad Airport.
- Translator:** 10
Confirm.
- Gurdial Singh Nijar:** 15
Then shortly within an hour you were hooded again, your hands tied again and questioned again by two Americans – one was a doctor. They asked questions, similar personal questions also about your health.
- Translator:** 20
Confirm.
- Gurdial Singh Nijar:** 25
And then you were taken to an individual wooden cell, no amenities, small one – 2 metres by 2 metres.
- Translator:** 30
Confirm.
- Gurdial Singh Nijar:** 35
Then you were taken again, placed a hood and tied you again. A woman soldier checked your person for any objects.
- Translator:** 40
Confirm.
- Gurdial Singh Nijar:** 40
Then 21, 22 – You have not eaten, not been fed. You were feeling dizzy and felt very weak. You asked to sit down, they refused to allow you. And they kept asking you to confess that you were part of the resistance, and kept asking you for who are your colleagues in the resistance. And then, translator, also paragraph 22. Thank you.

1 **Translator:**

During the interrogation I was standing. They did not allow me to sit.

5 **Gurdial Singh Nijar:**

Thank you. Then one of the interrogators, paragraph 23, you say, took you to see what you *"had never seen before."*

Translator:

10 Confirm.

Gurdial Singh Nijar:

15 Alright, I won't go into details if they're painful. You were then hooded, taken to a room that was all black in colour with some white dots. There were two pictures of Saddam Hussein with the eyes cut out on both sides of the wall.

Translator:

20 Confirm.

Gurdial Singh Nijar:

25 Then they grabbed your hair, they took hair, dragged you by the hair, and then threw you from one wall to another wall continuously, many times.

Translator:

Confirm.

Gurdial Singh Nijar:

30 And you lost consciousness.

Translator:

Confirm.

35 **Gurdial Singh Nijar:**

Many times you lost consciousness.

Translator:

40 Confirm.

- Gurdial Singh Nijar:** 1
And when you regained consciousness every now and then,
you heard they were playing loud sounds, hugely loud sounds
of music. 5
- Translator:**
Because there was in the side of the room a radio that was a
voice.
- Gurdial Singh Nijar:** 10
Then they dragged you to another cell in the same way,
dropped you to the floor. You were very tired.
- Translator:**
Confirm. 15
- Gurdial Singh Nijar:**
An American soldier came. He asked you to stand up. You
could not stand for long so you leaned on the wall or sat.
Every time you did that, the soldier would come and hit you 20
with a stick and ask you to stand straight.
- Translator:**
Confirm. 25
- Gurdial Singh Nijar:**
Then you say they threw a bag containing food that you did
not recognise, some biscuits along with some water.
- Translator:** 30
Confirm.
- Gurdial Singh Nijar:**
In the night you say you heard music, dancing, shouting. 35
- Translator:**
Confirm.
- Gurdial Singh Nijar:**
Then your cell was opened. They brought in a large dog which 40
barked at you, terrified you.

1 **Translator:**

Confirm.

Gurdial Singh Nijar:

5 After awhile they left, closed the cell door. But while the cell door was opened, you realized that they were doing this to all the other cells as well.

Translator:

10 Confirm.

Gurdial Singh Nijar:

And then the second day in prison, again the same thing. Hooded your head, took you for questioning.

15

Translator:

Confirm.

Gurdial Singh Nijar:

20 And then you were told again, "*Confess.*" If you did not confess, they will put your son in prison, they'll rape your daughter.

Translator:

25 Confirm.

Gurdial Singh Nijar:

And you pleaded with them, you said, "*I did not do anything wrong. I've no connection with the resistance. I am willing to swear on the Quran, on the Bible.*" That's what you said.

30

Translator:

Confirm.

35 **Gurdial Singh Nijar:**

The American said, "*I'm the devil myself.*" They took you to the black room. The same black American female; your clothes were removed. You were asked to sit on your knees and hands and they poured icy water on you. They asked to crawl from one side of the wall to the other side of the wall.

40

- Translator:** 1
Yes, I was crawling.
- Gurdial Singh Nijar:** 5
Then they hit you with a plastic tube, with a wood inside the plastic tube. They kicked you, and then when you dropped to the floor, they kicked you. They kept doing this; you started bleeding on your shoulders, back, arms, legs. And they kept doing this for many many hours. 10
- Translator:**
Correct.
- Gurdial Singh Nijar:** 15
You were then taken to your cell, asked to stand straight again. When you leaned on the wall you would be beaten. And your wounds, you said, the bleedings, shoulders, back, arms, legs; they were not attended to by the soldiers. You cried for the interpreter. You hit the floor, hit the door. The interpreter came and *"was sad to see my condition."* He asked the soldiers why I 20
could not rest and they said it was part of my punishment for not confessing.
- Translator:**
Correct. 25
- Gurdial Singh Nijar:**
Then you were taken back to the black room, hands tied, hair was grabbed and pulled tightly by the same female soldier. You could not take the pain; you said, *"God, take me."* 30
- Translator:**
Correct.
- Gurdial Singh Nijar:** 35
Somehow in the process, you say, your hands become free and you hit the soldier's face in the struggle. The soldier became angry; he smashed your entire body into the wall. And then another soldier came and you were taken back to your cell. 40

1 **Translator:**

Yes, it was the female soldier.

Gurdial Singh Nijar:

5 Then you were left in the cell for 2 days. No interrogation.

Translator:

Confirm.

10 **Gurdial Singh Nijar:**

Then on the third day you were taken again, hooded; and when your hood was removed you saw your daughter.

Translator:

15 Confirm.

Gurdial Singh Nijar:

20 Then you saw your daughter, presumably she has long hair, her hair had been cut short. Again, you were asked to confess. And you felt for your daughter. Your daughter was a university student and you felt that she should not be facing this. So you just wanted to agree, confess, anything they wanted to say, just to release your daughter.

25 **Translator:**

She said that she was actually feeling guilty that she is the reason why her daughter is there and the reply from her daughter was so strong and she said that, *"Iraq is for us all, not only for you."*

30

Gurdial Singh Nijar:

35 So, as you said, your daughter gave you strength and you decided not to agree to anything American said. Then, they put the hoods on your heads, both your heads. And then they shot a gun, you heard a bullet go. And then they told you they have killed your daughter.

Translator:

They told my daughter that, *"We killed your mother."*

40

Gurdial Singh Nijar:

Oh I see. So they told you that they killed the daughter, and they told the daughter they killed the mother? And she lost her mind, she began to shout.

1

Translator:

Confirm.

5

Gurdial Singh Nijar:

And then she was taken back, in this condition, she was shouting, they took her back, dragged her back to her cell.

10

Translator:

Confirm.

15

Gurdial Singh Nijar:

Later, sometime much later in the day, and, my God, she was alive. Great relief you felt.

Translator:

Right.

20

Gurdial Singh Nijar:

Next they took you back to the black room and there was your nephew before you, completely naked, and you just had on your underwear and they said, "*We will beat you until you confess.*" And then they were kicking your nephew, they were beating your nephew, they were kicking you, they were beating you.

25

30

Translator:

Correct.

Gurdial Singh Nijar:

And loud sound was being played. They took the plastic chairs. They beat you so much that part of the plastic chairs were embedded, became embedded, into your feet. And this went on for, you say, possibly, hours.

35

Translator:

Confirm.

40

1 **Gurdial Singh Nijar:**

And then they brought a machine and said the machine is going to be used now to harm you.

5 **Translator:**

Yes, and chop your head by this machine.

Gurdial Singh Nijar:

10 That frightened you? And then when they saw you were frightened then they just laughed and said, "*Clean the room.*"

Translator:

Confirm.

15 **Gurdial Singh Nijar:**

They kept beat your nephew on his private parts, he was naked at the time. And later, in that condition, he was removed to Abu Ghraib.

20 **Translator:**

Confirm.

Gurdial Singh Nijar:

25 Then the Iraqi interpreter later told you that they had released the female guest, they had released your daughter and you were relieved, happy. Now later you found out, that was just a lie.

Translator:

30 They released the female guest, but not my daughter.

Gurdial Singh Nijar:

35 Then you were taken, next day, this is day 5 already, in a helicopter. You asked for assistance for your injuries – you were bleeding, you had part of a plastic chair embedded in your foot, they refused. They took you back to Kirkuk, put you in a house. They chained your feet. They chained your hands.

40 **Translator:**

Yes, and the house were to military ... air force base military in Kirkuk.

Gurdial Singh Nijar:

Then the next day, day 6, proper good food was served. You took a piece of bread. Then that interrogator said, *"Stop. Where are the resistance fighters?"*

You dropped the bread and said, *"I do not know any resistance fighters."*

You were slapped, hands tied behind your back, put into a pickup truck, then taken to a large house which was converted to a prison. And there you met your friends and colleagues who recognised you and some of them threw some food over the cell for you.

Translator:

Yeah, it's not a big, a large house, but it is a hall – it's a airport hall but this it was converted to a prison.

Gurdial Singh Nijar:

Then after 3 days you were taken by helicopter back to Baghdad Airport prison and you were told that your son and nephew had been released but you found that out to be a lie.

Translator:

Confirm.

Gurdial Singh Nijar:

You say you were getting a fever caused by the wounds especially that plastic piece from the chair embedded in your feet. A doctor came. He said you needed surgery. They did the surgery the next day. But they did the surgery without any anesthesia and the plastic was pulled out of your feet without any anesthetics. You say that it was very very painful.

Translator:

Correct.

Gurdial Singh Nijar:

Then two days later you were taken to Abu Ghraib, pick up truck – the famous Abu Ghraib prison. There were a lot of prisoner. You were given a wrist-band. There was a number

1 given to you, 157574, and told that from now on, this is your
name. You will not be called by name.

Translator:

5 Correct.

Gurdial Singh Nijar:

10 Then, Ms. Jameelah, you say, they put a hood on your face,
on your head, and entered a room and examine a doctor. The
Doctor said you were seriously injured, needed urgent
treatment. But the interrogator said, "*No, no treatment for you.*"

Translator:

15 It wasn't a proper examination room. It just was a room that
had some PCs and there were a doctor there who said that
my injuries seriously and needed an urgent treatment.

Gurdial Singh Nijar:

20 Thank you. Then in the cell they gave you some medicine,
just one time. No follow up medicines. Food was bad, and
the cell was small – 2 metres by 2 metres – hardly this space
here, the space between this and that is more than 2 metres.
Less than 2 metres by 2 metres, kept in this cell.

25 **Translator:**

Correct.

Gurdial Singh Nijar:

30 Then paragraph 39, all the while you're not given proper
clothing, barefoot on the day you were taken from your house.
Then you asked to join them with promises of better food.
They said, "*Cooperate, and we'll release you.*"

35 And you kept saying, "*I know nothing about this so-called
resistance.*"

Translator:

40 Yes. Food and the medicine is according to your cooperation.
If you do, they will give you, if you're not.

Gurdial Singh Nijar:

Now in this small cell, you were in this small tiny cell, about 6 feet by 6 feet, they poured, during winter, they poured cold water to make the cell very cold and there you were laying injured, aggravated your injuries.

Translator:

Yes, it is everyday at 10pm they poured all cells with very cold water so it will be humid and very cold.

Gurdial Singh Nijar:

Yes, and then you were in this Abu Ghraib for almost 6 months in this condition. 6 months.

Translator:

Correct.

Gurdial Singh Nijar:

And about 20 days in Kirkuk and Baghdad.

Translator:

Correct.

Gurdial Singh Nijar:

Now one day, the members of the press, I think this was after Abu Ghraib was exposed to the world outside, the conditions, the press came and you shouted, raised your voices. The press heard you and realised there were women in the prison, and you say the press were surprised that women were there because officially, no women are supposed to be there, as far as the Americans were concerned. And then later, you were denied good food because you had alerted the press to your presence.

Translator:

Actually there were like about 120 members of press. They were visiting Abu Ghraib prison. At that time, before they took down to the prison, they visit the head of the prison and they were told that there are no women or children in this prison. Actually they were hiding us in another room in the down floor. So when we hear that they are passing by, we start to screaming and we covered the scream of Abu Ghraib,

1 and they hear us and they came to us, and they were really surprised because they were telling by the head of the prison that there were no women in Abu Ghraib. And we were actually about 5 women there.

5 **Gurdial Singh Nijar:**

In Abu Ghraib, you complained to that department, the CID, there was a complaints department. You lodged a complaint about your treatment, your situation. Your sister also had, unknown to you, complained about your detention. And after that an American committee came and interviewed you, and you told them everything that you have to this Court here, this Tribunal, and you say, I quote, *"the committee acknowledged that I'm a war victim."*

15 **Translator:**

Yes, correct.

Gurdial Singh Nijar:

20 Then one month later, you were released on 22 June 2004, and you have shown us, as an exhibit, your release letter – it's called **"Release Form For Detained Civilians"** from Abu Ghraib prison, that's marked as an exhibit; and as well, a letter from the ICRC which says, confirms that Ms. Jameelah was arrested in Iraq by the coalition forces, of course, led by the Americans. On 13 January, *"the above mentioned person was visited and registered by ICRC delegates on 14 March,"* and, *"the above mentioned person was released on 22 June 2004."*

30 So it's about 6 months and some days, almost 7 months. Can you confirm this?

Translator:

Correct.

35 **Gurdial Singh Nijar:**

So for 7 months, they dragged you out of your house, destroyed your house, your belongings, and then they subjected you to all this treatments, made you almost naked almost in front of your nephew, no treatment, no food – And then they just released you, no charge? The Americans?

Translator:

What I have told in this story is just brief and short of what I witnessed there. And as you see, after all this, they are coming to her and saying, "We are sorry."

1

5

Gurdial Singh Nijar:

Just like that?

Translator:

Yes.

10

Gurdial Singh Nijar:

They told your daughter they had shot you, and told you that they shot your daughter.

15

Translator:

Yes, my daughter stayed about 35 days and also the female guest. But the nephew stayed about 6 months and he has no relation with the resistance.

20

Gurdial Singh Nijar:

So you say, till to date, in your paragraph here, you endured residual injuries, you can't move your legs freely now. Your legs can hardly support you on your feet, you know – I see you shuffling in and out – this paragraph 45. Your left arm is also affected. You can't use it. It aches. You are unable to wear shoes that cover your feet – at that time when you signed this, 2009 – due to your injuries. You can't endure cold climate, cold air conditioning, injuries to your lower back, and you need further treatment for that, surgery perhaps.

25

30

Translator:

She said yes, I'm suffering from what happen and actually she went to many doctors in Damascus and she present her situation and examined herself. She said that they have been told that she needed an operation but this operation but this operation could make her handicap if it not succeeded. And until now she cannot wear proper shoe and she has to wear shoe that is open from, medical shoes that is opened from all sides even in winter. And she cannot resist the cold and it's very painful for her. And she couldn't afford this operation

35

40

1 because of the limit of her budget, and till now, she's trying to
do.

[Jameelah adds]

5 **Translator:**

She's saying that, especially the American, the female soldier,
that was torturing her, she was beating her especially in the
neck and the back, and she's doing this very hard and she's
10 doing it continuously every time, and then they were using
some tools to do this – not only for her, but for all prisoners.

[Jameelah continues]

15 **Translator:**

She said that when you mentioned in the paragraph that, "I
punched a soldier in his face," she's the one, while kicking
me she smashed her head to the wall and that was very hard
and she felt like she's losing her neck. And that is still hurting
20 till now.

Gurdial Singh Nijar:

And finally, you said in your last paragraph, *"I'm one of the
many who have suffered as war victims. I have seen much suffering.
25 Women have suffered tremendously. Many have been raped."* Can
you confirm that?

Translator:

Confirm. What is hurting me much in that prison, that I saw
30 children. There are about 25 children, their ages starting from
9 to 12.

Gurdial Singh Nijar:

Being detained in the prison ...

35 **Translator:**

Yes, in the cells in front of her. She is saying that the women
in the cell, and the children, the front cells. What could those
kids, children do? What harm could they do? And some of
40 these children, they were staying there about 1 year and a
half. And they hear that some have suicide. What you saw
and what you hear from me here, and even in the picture

released from Abu Ghraib is like a drop in the sea of what I saw there. And especially, that myself, was in front of the torture cell. 1

And then I'm feeling guilty if I do not speak loudly about what happened and my conscience is leading me to tell this story to everyone. 5

I never saw something like that in my life, even in cowboy movies, or horror movies. What I saw in the prison really cannot be described. 10

They actually have no conscience. Guards there are not human and they have not any felt of humanity inside them. 15

All the period that I have been in Abu Ghraib I have been wearing the same clothes very light one, and without shoes.

And they were trying to negotiate and saying, *"If you just confess or cooperate with us, we will give you proper food, we will give you clothes, we will give you shoes."* And I refused that because I don't know anything and that's why they left with the clothes and the situation. 20

Actually there was no interrogation about me exactly – it's just that they were collecting information about Iraq and Iraqi people. 25

Accusations there were already there, and they just tell to anybody the same accusations, *"You are with the resistance, and you are against the soldiers."* 30

Before my release, I asked one of the soldier that interrogated me. I asked her, *"Why Jameelah?"* She answered that, *"We were asked about the women that has the social position in Kirkut, and they pointed to you. They say 'Jameelah'."* That's actually what they were doing. She said, *"We are using you to scare the whole women, about three thousand and something women."* So they were doing thinking ... they took Sumairah, took another name ... 35

Then I was asking her also, that, *"Are you feeling? What are you doing? You destroy the family, you finish our house. My husband* 40

1 *is dead so I am responsible for my family. Even my children*
 stopped going to school. Are you feeling? What are you
 doing?"

5 Then when I was released, one American general said, *"If you*
 were staying in Iraq, we will accuse again and arrest you."

10 Then I didn't believe the general and said, *"He's just threatening*
 her." But she moved from her house to another part of Iraq
 with her children. But later on, I hear about the second letter
 of prison.

15 So I went to Syria after that. And that was actually what
 happened. My friend that was with me in the prison, they
 arrested her again, and she spend 2 months there and until
 now I cannot go back to my country.

 Thank you.

20 **Gurdial Singh Nijar:**

 Thank you very much. Your Honours, that concludes my part.
 My colleague, Professor Boyle have some short points to make,
 with your leave. Thank you.

25 **Francis Boyle:**

 Your Honours, concerning the testimony of this victim, I want
 to draw to your attention especially 2 points from her
 statements.

30 If you turn to paragraph 16 on page 1192, where she's in the
 Apache helicopters with American soldiers, her son, nephew,
 myself and the girls, and they asked that the windows and
 doors be closed because it's cold, and the soldiers said this
35 could not be done because to avoid any attack by the
 resistance, because if the resistance shot at the helicopter, we
 would be likely hit first.

40 Your Honours, it's clear in the process of being tortured, this
 victim and her family were being used as *human shields* by
 United States military forces. And the use of civilians as human
 shields is a grave war crime. And I would point out, a
 cowardly, despicable act by United States armed forces, to

use civilians as human shields. But typical of the American war of aggression against Iraq to murder 1.4 million Iraqis to steal their oil. We've already addressed these points in the preceding charge of Crime against Humanity. I will not repeat them here.

The 2nd point I wish to make and elaborate on from her statement; if you turn to page 1202: This is the official ICRC document, 1202 at the end where the ICRC, International Community of the Red Cross, said she was arrested by coalition forces on 13 January 2004 and was not visited or arrested by the ICRC until 14 March 2004. So, in other words, for 2 months, she was not registered with the ICRC. The Geneva Conventions clearly require that civilians such as this victim be registered with the ICRC as soon as possible, preferably within 48 hours. Why did the US Armed Forces not register her with the ICRC?

And the answer is very clear, will become very clear later in our submissions. This was common practice by United States Armed Forces in Iraq not to register civilians with the ICRC so they could better torture them, and better murder them, and better 'disappear' them; or if they died as a result of being tortured, no one would know the difference. This is common, well-known practice US military forces and the CIA in Iraq referred to as "*keeping them off the books*" so that they could be better tortured, murdered and 'disappeared'.

What this means then, that in addition to being a war crime under the Geneva Convention, is that this victim was a 'disappeared' person for at least 2 months. She was 'disappeared' deliberately and on purpose; and the enforced disappearances of human beings is a war crime, and when the practice is wide-spread and systematic, as it was in Iraq, a crime against humanity. So this victim here was not only a victim of war crimes and torture but a crime against humanity, and I would respectfully suggest that the judges take this into account. Thank you.

Translator:

She wants to clarify. Thank you. She wants to say that during this time from the 13th of January to the 14th, period of 2

1 months, it was the worst torture ever. And before the Red Cross
coming, they were treating us, they were giving us some oil
to cover the injury from our bodies. And the girl that visited
5 us from Geneva, she was very scared from the Americans
because they were watching her closely in any move or
anything she say. She gave us a pen to write letters to our
families. The prisoners before me, they told me don't ever
give your family address because the letter will be taken by
10 the Americans, and translated, and took the addresses that
we sent to. And I had another son and they didn't bring him
yet.

So I put the address of my brothers, and I write just two letters,
15 "*I am still alive*" and my family don't know where I am. The
letter, after I was released ...

Francis Boyle:

I just want to point out, this is precisely why the Geneva
20 Conventions require the almost immediate registration of
civilians with the International Committee of the Red Cross.

When she said, "*These 2 months was the worst torture ever,*" the
United States Armed Forces knew it because without her being
registered with the Red Cross, they could do whatever they
25 wanted to her, up to and including murder her, and then
getting rid of her body. And that is why she was not registered
for 2 months, and only by the grace of God was she not
murdered. And that is also why then this is a separate crime,
the enforced disappearance of a human being for these 2
30 months that she was subjected to. And in the current
circumstances, this is not just a war crime. It was a "*Crime
against Humanity*", which in terms of severity is just short of
genocide. Thank you.

35 **Gurdial Singh Nijar:**

Your Honours, I would be offering the amicus curiae my
witness to proceed. I don't know whether it's an opportune
time to have a short recess. I leave it entirely to Your Honours.

40 **Judge Lamin Mohd Yunus (President):**

You can go on now until 12.30.

Gurdial Singh Nijar:

Yes, thank you. In that case, this is ... about the prosecution's eliciting of testimony from this witness. And now we leave it to the Amicus Curiae to proceed. Thank you.

1

5

Jason Kay Kit Leon:

Good morning Madam Jameelah.

Translator:

Good morning.

10

Jason Kay Kit Leon:

My role here is as amicus curiae for the Court, for the Tribunal. I am a friend of the Tribunal. I will ask you questions that will expand on what you have said so far and if you do not understand the question or if it is not clear, please tell me. I do apologise if some of these questions offend you, beforehand.

15

20

Translator:

No problems.

Jason Kay Kit Leon:

Let's start with, you said you are a widow. How many children do you have?

25

Translator:

Three.

30

Jason Kay Kit Leon:

Okay, three children. How long has your husband passed away?

Translator:

About 15 years.

35

Jason Kay Kit Leon:

Is it 1997? About 1997?

40

Translator:

1999.

1
Jason Kay Kit Leon:
And in 1999, how old were your 3 children?

5 **Translator:**
The eldest one just graduated from university. And the girl she was studying at the time at the university. The youngest one was in primary school.

10 **Jason Kay Kit Leon:**
And you were you working at that time?

Translator:
Yes.

15 **Jason Kay Kit Leon:**
Were you working at the time as the Head Chief of the Cooperations Union?

20 **Translator:**
Yes.

Jason Kay Kit Leon:
When did you start ... What year did you start to work?

25 **Translator:**
1980.

Jason Kay Kit Leon:
30 So by that time, you were already about 19 years in service. Was it with the same employer since 1980?

Translator:
Yes.

35 **Jason Kay Kit Leon:**
In paragraph 1, you said that the Cooperations Union that manages the other government union in Kirkuk. Was it a government position?

40 **Translator:**
No.

- 1
- Jason Kay Kit Leon:**
Who was your employer?
- Translator:** 5
Different persons.
- Jason Kay Kit Leon:**
Who was the head of the Union? 10
- Translator:**
She is the head of the Union.
- Jason Kay Kit Leon:**
What was the job of the union? To manage other government unions? Can she just explain a little bit of what it meant? 15
- Translator:**
It is for the benefit of the people, Iraq and the citizens. Those who have limit budget and limit finance and problems. 20
- Jason Kay Kit Leon:**
And where was the funding for the Union sourced from?
- Translator:** 25
From supermarkets and some small businesses that own some profits.
- Jason Kay Kit Leon:**
How many people were working under her? 30
- Gurdial Singh Nijar:**
Your Honours, I am not objecting but I certainly hope that he can show some relevance at some point. These questions of how many employee and so on ... 35
- Judge Lamin Mohd Yunus (President):**
Yes, some very very pertinent one. Not all these little little minor things. 40
- Jason Kay Kit Leon:**
I will try to speed up. An estimate on how many people were working under her?

1

Translator:

She's saying, the person who belong to this, or the workers?

5 (inaudible)

Jason Kay Kit Leon:

Can she give an estimate? Just an estimate will do.

10 **Translator:**

The workers, there were about 400. The workers were working for them. The people who belong, in general, to this, they were about 4,000 and more.

15 **Jason Kay Kit Leon:**

4,000 members in the union. And this union was for only Kirkuk or the whole of, the larger area?

Translator:

20 Only Kirkuk.

Jason Kay Kit Leon:

And her main source of income was from this?

25 **Translator:**

Yes, I had salary from this.

Jason Kay Kit Leon:

The question was: Was it the main source of her income?

30

Translator:

Just only this.

Jason Kay Kit Leon:35

She mentioned they were asking about the resistance. Can she explain who are "*the resistance*" for the benefit of those of us who are not familiar with ...

Gurdial Singh Nijar:40

Your Honours, I object to that question.

Judge Lamin Mohd Yunus (President):

Yes?

- 1
- Gurdial Singh Nijar:**
I object to that question, "*Who are the resistance?*" This is exactly what we are talking about. The Americans were saying, "*You're part of the resistance,*" "*You are the resistance,*" and she
5 state very clearly in a sustained manner. So I think this a very unfair line of questioning to say, "*Who are the resistance?*" What is this, another interrogation or something like that?
- Can my comments also be translated? 10
- Jason Kay Kit Leon:**
May the question be posed to the witness, or is it disallowed?
- Judge Lamin Mohd Yunus (President):** 15
Yes, go ahead.
- Jason Kay Kit Leon:**
What is your understanding of the word "*resistance*" as is used in your declaration at paragraph 4? 5th line. What do you
20 mean by that? "*The resistance*". Who are you referring to?
- Translator:**
When somebody invade you as a ... I think even Bush will be
25 resistant of this.
- Jason Kay Kit Leon:**
Okay. So, the "*parties*" or the "*entities*" that were resisting the invasion of the United States in Iraq – that is your definition
30 of "*resistance*," yes?
- Translator:**
Any Iraqi people who refuse the invasion is a "*resistance*".
- Jason Kay Kit Leon:** 35
At that time, did you refuse the invasion of the Americans?
- Translator:**
Yes.
40

1 **Jason Kay Kit Leon:**
Specifically on paragraph 4, line 5: Were you providing
monetary assistance to other people who resisting the invasion
5 of the Americans? You may answer or you may not answer.

Translator:
She said that when the American broke into her house by force
and they searched everywhere and, you know that resistance
10 need a lot of money to finance them all, but they didn't find
only 100.

Jason Kay Kit Leon:
I understand. That is in her statement. Was she providing
15 money to the resistance?

Translator:
I didn't have. If I have, I will give them.

20 **Jason Kay Kit Leon:**
It's an answer, that's all we want, Madam Jameelah, a clearer
picture.

25 Paragraph 6, line 2: *"They then searched our family car and found
a battery charger and they alleged that it was used to explode bombs."*

Were you making bombs?

Translator:
30 I think if you search any Iraqi house you will find a battery
charger.

Jason Kay Kit Leon:
The question remains: Was she making bombs?
35

Translator:
No.

Jason Kay Kit Leon:
40 Did anyone in your house, to your knowledge, in your house
or household, to your knowledge, was making bombs?

Translator:

No.

Jason Kay Kit Leon:

Paragraph 26. Let me just read to refresh memory. *"The second day with my head hooded I was taken for questioning. I was told that if I did not confess they would put my other son in prison and then will rape my daughter. I said I did not do anything wrong and have no connection with the resistance. I am willing to swear on the Quran or Bible."*

Are you Muslim or are you Christian or did you say this because of you were scared, angry, tired? What?

Translator:

No, and then I felt that people were inside, there are no Muslim, or no Christians, or Jew.

Jason Kay Kit Leon:

The thrust of the question is: Why did she say this? What was her mental state, or what was her physical state at the time when she said this?

Translator:

She said that: I know that anybody in a Tribunal will have to swear on something that what he is telling is the truth. So that I said I can swear on anything you want, like the Quran or Bible. And then after I talk with him, I realised he did not believe in any of this. Don't think that I with my daughter we are afraid of the soldiers. Actually I would like to say what my daughter said, *"That you are the prisoner of us, not we are the prisoner of you, because we are human and even though we are tied, but we are free inside, not like you. You come to Iraq and invade my country."*

Jason Kay Kit Leon:

The people who beat you, the people who threw you wall to wall, the people who hit you until the plastic went into your feet: If they were in this chair, handcuffed, shackled, legs shackled, and no one else was in this room except you and that person and you had a stick, what would you do to him or her?

1 **Francis Boyle:**

5 Your Honour, I object to this line of questioning. It's purely hypothetical, speculative and encouraging this victim of war crimes and a crime against humanity to admit that she herself might commit a crime. This is preposterous, badgering the witness in this way and trying to entrap her into admitting that under certain hypothetical circumstances, she might commit a crime. So, I object to this line of questioning.

10 **Jason Kay Kit Leon:**

Is the objection sustained?

15 **Judge Lamin Mohd Yunus (President):**

Yes, objection sustained.

Jason Kay Kit Leon:

20 I will move on. You have said at paragraphs 32 and 26. Let us go to paragraph 26 first, the last line, *"The interrogator was very cruel and kept doing this for many hours."*

And then at paragraph 32, line 6, *"This beating went on for possibly some hours."*

25 You have indicated a measure of time in both instances. You have indicated *"hours"* in both instances. Was there a clock in the room at that time?

Translator:

30 I didn't have a watch at that time and no clock at that time, even though the room was dark and I do not know we are at night or in the day. But I can feel the hours in torturing. I can feel that it was a long time.

35 **Jason Kay Kit Leon:**

40 Puan Jameelah have you ever woken up at night and thought it was subuh already but was probably 2 or 3am in the morning? *"Subuh"* – morning prayers. Has she ever woken up and then she thought it was time for morning prayers but it was really about 2 or 3am in the morning?

Translator:

I just pray without know the time. I don't know what is time.

Jason Kay Kit Leon:

I am sorry, let me clarify the question. Before the war, before all of this, I'm sorry, my mistake ... Before the war, before all this happened, did she ever sometimes wake up too early and she thought it was time for morning prayers but it was actually a few hours earlier? Did she ever wake up like that?

Translator:

No, I prayed at the time.

Jason Kay Kit Leon:

Could she have been wrong that the beatings lasted for hours? Could it have been shorter.

Judge Lamin Mohd Yunus (President):

Counsel, what difference does it make either more hours or less hours? Beating is beating isn't it?

Jason Kay Kit Leon:

Much obliged Your Honour.

Translator:

No, I'm not wrong.

Jason Kay Kit Leon:

Let us go now to the identification portion. Paragraph 9: *"Then my hood was removed and I saw that I was in a big hall with no windows except for a window in the ceiling. And I was then asked 2 questions – my name and date of birth by an American soldier."*

How did you know that this person was an American or a soldier?

Translator:

He was speaking English and there was a translator beside him.

Jason Kay Kit Leon:

Was he in uniform?

Translator:

No.

1

Jason Kay Kit Leon:

I am speaking English and I have a translator. Am I an American soldier?

5

Translator:

It was an American military base. So, all people there are American.

10 **Jason Kay Kit Leon:**

Could there have been non-Americans at an American military base?

Translator:

15 I cannot ask the interrogator his ID and check his nationality.

Jason Kay Kit Leon:

I understand ...

20 **Francis Boyle:**

Your Honour, this is calling for speculation on part of the witness. Obviously it is a US military base. It is well known that on the US military base, interrogations were conducted either by members of the United States Armed Forces or the
25 Central Intelligence Agency who were not wearing uniforms but are part of United States forces or contractors hired by either the US Armed Forces or the Central Intelligence Agency who are not wearing uniforms. In any event, all 3 were agents of the United States Armed Forces and occupation authorities,
30 and it is purely speculative to ask these questions on the part of this victim. Thank you.

Jason Kay Kit Leon:

35 If the prosecution is willing to concede that there could be non-Americans at an American military base, I will cease immediately.

Francis Boyle:

I did not concede that at all.

40

Jason Kay Kit Leon:

If, if, ... if the prosecution is willing to concede....

Francis Boyle:

If what?

1

Jason Kay Kit Leon:

If the prosecution is willing to concede that there could be non-Americans at the American military base, I will cease this line of questioning and leave it for submissions. Otherwise, I will respectfully request that the Tribunal allow me to continue, perhaps a few more questions.

5

10

Francis Boyle:

I simply objected this one line of questioning as speculative and calling upon conjecture upon the part of the witness. She has no idea but the person did speak American. Thank you.

15

Judge Lamin Mohd Yunus (President):

Proceed on other aspect of the evidence.

Jason Kay Kit Leon:

Just a moment, Your Excellencies.

20

The last thing you said was you could not check the ID of the person who was interrogating you. Yes?

25

Translator:

Yes.

Jason Kay Kit Leon:

Let's move on to paragraph 10: *"Later a hood was placed again on my head and I was dragged to another room. There my hood was removed and I saw an American who was in civilian clothes with another Arab looking man who spoke Arabic."*

30

Will your answer the same? Is it the same type of answer you will give if I pose the same line of question?

35

Translator:

The first man, the soldier who asked me two questions, he was wearing a uniform. But I want to confirm that when I was dragged to another room, there was an American civilian who was wearing civilian clothes with the Arab looking guy.

40

- 1 **Jason Kay Kit Leon:**
 How does she know he was an American? Civilian clothes?
- 5 **Translator:**
 I think I answered this before that the American soldiers were taking me from my home and everybody in Iraq knows that in Kirkuk military base are for the American. All American are inside.
- 10 **Jason Kay Kit Leon:**
 I understand the background. I would like to focus now on the issue ... Paragraph 10 at line 2: *"There my hood was removed and I saw an American who was in civilian clothes with another Arab looking man who spoke Arabic."*
- 15 Did she deduce that this civilian man was an American because he was speaking English and had a translator. Was that the reason she concludes that it was an American?
- 20 **Translator:**
 I was quite sure because we know that there were some parts of Iraq for American military and the other part are for British military. So, I was quite sure that he is American. She said, *"Do you think that they are really very nice so you can ask them, 'What is your nationality?' and you can't even think what is his nationality because even before answering any question they start to beating her?"*
- 25 **Jason Kay Kit Leon:**
 May I deduce now that she assumed he was an American because she was in the American part of Kirkuk rather than the British part. Can I say that?
- 30 **Translator:**
 I think I have answered you before when I said there's an American soldier break into my house and only American soldier.
- 35 **Jason Kay Kit Leon:**
 Alright. The American, that was in paragraph 4, *"the American military broke into my home by force in Kirkuk and I was very frightened."* They were in uniform?
- 40

Translator:

Yes.

1

Jason Kay Kit Leon:

Was she frightened or not? I heard that she was not frightened just now.

5

Translator:

If you can just feel the situation that when they came and broke into my house, the way that they came - there were aeroplanes started to fly around and there were a lot of trucks, a lot of soldiers is like I feel that they are coming for a very big target and I didn't realised it was me. And then it's like we are all scared because of what is happening. We thought something big happening. And then they didn't break into my house just like this - they were using sound bombs and they break into my house and even I couldn't remember how I was in the 1st floor. I couldn't remember how I got down. So, she was frightened.

10

15

20

Jason Kay Kit Leon:

She was frightened - I would be too actually. Are you a big target?

25

Translator:

I felt that.

Jason Kay Kit Leon:

I suppose the actual question I wanted to ask: Are you a member of the Baath party?

30

Translator:

Yes, and it's my honour.

35

Jason Kay Kit Leon:

You mentioned about good food and bad food given depending upon how much you cooperated. What would you consider good food and what would you consider bad food? Could you elaborate.

40

1 **Translator:**

She said they were using this method. When I enter the jail, they always tell me, *"If you cooperate, we will give you good food, if you do not, we will not."*

5 **Jason Kay Kit Leon:**

Now obviously she did not cooperate or she did not say anything, yes?

10 **Translator:**

Yes.

15 **Jason Kay Kit Leon:**

And what food did she get?

Translator:

20 There is a plastic bag, there is things inside. I just recognized the biscuit so I eat the biscuit and I took the water. And the other things inside has a bad smell, so I didn't.

Jason Kay Kit Leon:

So this would be *"bad food"* in her ...

25 **Translator:**

Yes.

Jason Kay Kit Leon:

30 Just few more questions Your Excellencies. Paragraph 16, *"Two Apache helicopters came with a few American soldiers ..."* ... The 2nd last line, *"Because if the resistance shot at the helicopter we would be likely hit first."* To your knowledge, to your own personal knowledge, were the resistance shooting at Apache helicopters?

35 **Translator:**

I don't know.

Jason Kay Kit Leon:

40 First page, paragraph 5, this was when you were arrested, taken: *"My hands were tied at the back with wire very tightly and the soldiers dragged me."* Like this?

Translator:

Yes. Until now I cannot move my left arm to my back. And that was the most painful thing happened to me ... this position till the blood cannot circulate. The wire was a nylon, so when they tied you, you cannot even breathe. And now I cannot put my left arm back.

Jason Kay Kit Leon:

Were you resisting arrest at that point?

Translator:

No.

Jason Kay Kit Leon:

But they dragged you anyway?

Translator:

Yes, and very strongly and from my hair, and things I don't want to say.

Jason Kay Kit Leon:

She may choose to answer or not answer. The last paragraph, the last sentence: *"Women have suffered tremendously and many have been raped."* I just ask: Did she see any of these? Did she witness any of these, or was it only what she heard?

Translator:

When I entered Abu Ghraib, there were 2 girls. Before I entered the torture room they were raped. And until now, we don't know, we couldn't find them or where there are now.

Jason Kay Kit Leon:

The sequence is, *"before she entered."* Did she witness it, or did she witness the aftermath?

Translator:

Yes. When I entered coming from the airport, I saw those 2 girls. And after that they disappeared but when I go up after I've been in the torture room, the other woman prisoners told me that these 2 girls are sisters and they were raped.

1 **Jason Kay Kit Leon:**
So she knew because she was *told by the other women in the*
5 *prison?*

Translator:
Yes. And that was the most what I scared when I was here,
that my daughter and my female guest will witness the same
10 thing. And this is was more than what I witness.

Jason Kay Kit Leon:
Pn. Jameelah, thank you. I will apologise on behalf of the Arab
man who slapped you. I don't know him but a man should
15 never slap a woman.

Translator:
I just want to say that the female body is absolutely different
from the male body but the torture methods were the same
20 for both sex and has the same brutality.

Jason Kay Kit Leon:
Thank you very much Puan Jameelah. No further questions.

Francis Boyle:
25 Your Honours, just a few questions on re-cross-examination.
It will not take long, if I may. Just a few questions to clarify
your testimony.

You say you refused the American occupation but you did
30 not use military force against the Americans. Is that correct?
You did not use military force against the Americans?

Translator:
Yes.

Francis Boyle:
35 And you did not take up any type of arms against the
American?

Translator:
40 Yes.

Francis Boyle:

And you did not assist to make any type of bombs or explosives to be used against the Americans?

Translator:

No. The invasion to Iraq was at the 3rd month. And after 3 months I was taken.

Francis Boyle:

Pardon?

Translator:

The invasion of Iraq happened, and after 3 months they arrested me.

Francis Boyle:

Right. Thank you Ms. Hameed. That's all I wanted to ask, Your Honours, in order to clarify the fact, despite any confusion that might have occurred in her cross-examination, that she at all times remained a civilian within the meaning of the 4th Geneva Convention. The United States government was obligated to respect all of her rights under the 4th Geneva Convention as a civilian. She never took up arms against US military occupation forces. There are no grounds to believe she did this. She never used any type of military force against US military occupation forces.

So, for that reason, she was at all times protected, or protected person, within the meaning of the 4th Geneva Convention. And her rights, all 149 articles of that Convention protected her absolutely. She had more rights under the 4th Geneva Convention than you or I here would have walking down the streets of Malaysia. She was basically sacred, and they violated her completely.

She was on a US military base and it didn't matter who tortured her on the US military base. The United States government on that base was the belligerent occupant and, under the 4th Geneva Convention, they had an absolute obligation to make sure she wasn't tortured by anyone, whether it was US military forces, or the CIA, or armed

1 contractors hired by the United States government. So, it's
completely irrelevant who did that torture. It was the United
States' obligation to make sure she was not tortured or abused
by anyone. The United States of America at all times the
5 belligerent occupant of Iraq.

Yesterday I referred to this point in a Security Council
Resolution accepted by the United States that was the
belligerent occupant of Iraq, and I gave you the citation for
10 that Resolution. I now have an article I wrote directly on this
point which I ask to be circulated to the judges and to the
defence detailing all obligations of the United States
government under that Security Council Resolution, under
the Geneva Conventions, under the Hague Regulations, and
15 even under the United States government's Law of Land
Warfare Field Manual 27-10 that is still binding, establishing
that the United States government was the belligerent
occupant of Iraq under all these sources and had an absolute
obligation to make sure that people such as this victim and
20 our previous 2 victims were not subject to torture.

Jason Kay Kit Leon:

Amicus wishes to record its thanks to Professor Boyle of the
preview of the prosecution's submission.

Judge Lamin Mohd Yunus (President):

I will now adjourn for lunch. Be back at 2.30.

Translator:

30 I want to thank Mr. Counsel and I want to say that the person
who tortured me was the person responsible for the guard
and her job was just to bring water to the prisoners and
maintain the place. And I want to say also that this American
soldier, that she was acting against any human rights. She
35 was refusing, all the time, refusing us to go to the toilet. And
if we did anything inside our cells, we would be beaten also.
And when I ask for the ... and I wanted to know from where I
can take my rights because in the ... the general said that she
has no rights of what she did to you. But how do I get my
40 rights?

Gurdial Singh Nijar:

Okay, I think we've recorded all that. We thank you very much Ms. Jameelah. Just convey our thanks, and we'll say that we salute her as being a very brave woman for having withstood all that and come here and testify this again. Thank you very much.

Judge Lamin Mohd Yunus (President):

Can we proceed at 2.30?

Gurdial Singh Nijar:

Yes, we will be able to proceed at 2.30.

Francis Boyle:

Your Honour, if I may, Judge Webre had asked for the Zelikow memorandum, and we will be making submissions on it, but here it is. Could the Registrar please distribute the Zelikow memorandum to everyone, since Judge Webre requested it.

And also this morning, with respect to the charge of conspiracy, I have sighted the article by Professor Jordan Paust which I also have here. We will be making submissions on this also in the further course of the proceedings. But here it is. It establishes the fact that the lawyers were indeed part of a criminal conspiracy to undermine the Geneva Conventions and the US War Crimes Act.

And I should point out Professor Paust is one of the United States of America leading experts on the laws of war, and before becoming a professor, he had been a professional military lawyer with the JAG corp, working for the Pentagon in charge of investigating and prosecuting war crimes. So I would ask the Registrar to please distribute Professor Paust's article at this time. Thank you Your Honours.

Registrar Musa Ismail:

Court is adjourn and shall resume proceedings at 2.30pm. All rise.

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Registrar Musa Ismail:

5 All rise.

[Registrar distributes the Statutory Declaration of Ali S.H. Abbas @ Ali Shalal and Rhuhel Ahmed to the Judges]

10 Gurdial Singh Nijar:

May it please Your Honours, I have through the Registrar tendered for Your Honours' attention two (2) Statutory Declarations. The first is the Statutory Declaration by **Ali Sh. Abbas @ Ali Shalal**, and I respectfully request that the Tribunal marks this as **P4**.

Judge Lamin Mohd Yunus (President):
P5?

20 Gurdial Singh Nijar:

P4 - Ali S.H. Abbas @ Ali Shalal and the second Statutory Declaration is that by **Rhuhel Ahmed** and I request that this be marked as **P5**. We have supplied copies to the Defence team as well.

25 Your Honours, the way in which I propose the afternoon proceedings continue, subject always to Your Honours direction in this matter, first is, I propose to read or highlight aspects of the statutory declaration myself, and I wish it to be entered on record that both these witnesses were scheduled to come, but their explanation, as has been intimated to Your Honours earlier - they have been very traumatised by this. Ali Sh. Abbas is, in fact, undergoing medical treatment, and if the defence so wishes, we can supply the confirmation from the doctors of this fact. And so it is our respectful request that these statutory declarations be accepted as forming part of the evidence in this Tribunal's hearing.

Judge Lamin Mohd Yunus (President):

40 The explanation for Ali's absence today ...

Gurdial Singh Nijar:

Yes ...

- Judge Lamin Mohd Yunus (President):** 1
He's attending ...
- Gurdial Singh Nijar:** 5
He's attending medical treatment, and this is not unrelated to the infliction of the acts by the coalition forces led by the Americans.
- Judge Lamin Mohd Yunus (President):** 10
So ... (conferring) ...
- Gurdial Singh Nijar:**
So I ask that these 2 statutory declarations be accepted as forming part of the record of the proceedings of the Tribunal. 15
- Judge Lamin Mohd Yunus (President):**
Ruhel. What is the explanation? Is he receiving medical treatment also? 20
- Gurdial Singh Nijar:**
Ruhel, we do not have a clear explanation. He was supposed to have come, and then at the last minute he just said that he's unable to come and to testify all over again with regard to the treatments he received. 25
- Judge Lamin Mohd Yunus (President):**
So where is he at the moment?
- Gurdial Singh Nijar:** 30
We understand that he is actually in the United Kingdom. So what I propose to do is that Ruhel's Statutory Declaration be entered and I also will request that the notes with regard to his giving of the testimony before the War Crimes Commission, not the Tribunal, which forms part of the report, the first report – K LWCT Reports 2009 from pages 87 to 98 be also accepted. So it will buttress by the fact that he actually appeared before the KL War Crimes Commission which is the investigative arm of this proceedings. 35
- Judge Lamin Mohd Yunus (President):** 40
May we know, Ruhel is not coming and who has he inform it?

1 **Gurdial Singh Nijar:**

He has informed the Secretariat of the KL War Crimes
Commission. We wrote to him, had some correspondence with
5 him, and then finally he said he's not able to come and wishes
us luck in the proceedings, so essentially we deduce from that
that he just doesn't want to re-live this experience; and so we
ask that his statutory declaration combined with the notes of
proceedings where he re-stated his statutory declaration, and
10 he was asked questions by members of the Kuala Lumpur
War Crimes Commission, and it appears at page 87 to 98.

So he's actually testified before another arm of the ... under
that Charter of the Kuala Lumpur War Crimes Commission.
15 Under the Rules of Evidence and Procedure of the Tribunal,
Part 2, under Article 24, even secondary and hearsay evidence
is admissible in the interest of justice – Article 24 which
appears at page 41 of the red book. If I could respectfully invite
Your Honours to refer briefly to Article 24. It says,

20 *"Secondary and hearsay evidence may be admissible in the interest
of justice in particular circumstances but the Tribunal shall accord
secondary and hearsay evidence less cogency and shall decide finally
on the total weight of the evidence with due regard being given to
25 primary evidence."*

So this would be in the nature of supportive evidence, and
we recognise the limitation, but we will use this as part of the
whole corpus of evidence that is being tendered, and then
30 leave it entirely to Your Lordships, Your Honours, discretion
as to the weight to be accorded given the totality of the
evidence.

On that basis then, perhaps I can proceed Your Honour?

35 **Judge Lamin Mohd Yunus (President):**

Yes, you may proceed.

Gurdial Singh Nijar:

40 I refer to the Statutory Declaration of Ali Sh. Abbas and I will
try to summarise some of the evidence, where possible. He
was then 45 years old. He was an Islamic lecturer in the city

of Al-Alamiya, Iraq and he wanted to testify, to put on record
his torture experience while in Abu Ghraib prison. 1

While he was going to prayer in the mosque in Alamiya, 13th
October, 2003 after the Americans invaded Iraq, the American 5
troops arrested him. They tied his hands to the back, put a
bag over his head, and took him to a small prison in a US
military camp – and he identifies the military camp
commander as one Captain Philips who told him that he had
been ordered to arrest him and he did not know the reasons. 10
After 2 days, they transferred him to Abu Ghraib prison and
together with other detainees they were made to sit on the
floor, were dragged to the interrogation room. This so-called
room, and I quote,

*This so called room is in fact a toilet (approximately 2 metres
by 2 metres) and was flooded with water and human waste
up to my ankle level. I was asked to sit in the filthy waste
water while the American interrogator stood outside the door
with a translator.* 15 20

*After the interrogation I would be removed from the toilet
and before the next detainee is put into the toilet, the guards
would urinate into the filthy water in front of the other
detainees. The first question they asked were, 'Are you Sunni
or Shiia?' I answered that this is the first time I have been
asked this question in my life. I was surprised by this question,
as in Iraq, at that time, there is no such distinction or
difference. The American interrogator replied that I must
answer directly the question and not to reply outside the
question. He then said that in Iraq there are Sunnis, there are
Shiias, there are Kurds. The interrogators wore civilian clothes
and the translator, an Afro-American, wore an American
army uniform.* 25 30

*When I answered that I am an Iraqi Muslim, the interrogator
refused to accept my answer and charged me for the following
offence: That I am anti-Zionist and anti-Semitic; I supported
the resistance; I instigated the people to oppose the occupation;
that I knew the location of Osama bin Laden.* 35 40

1 I protested and said that Muslims and Jews descended
from the same historical family. I said that I could not
be in the resistance because I am a disabled person have
an injured hand.

5 The interrogator accused me that I had injured my hand while
attacking the American soldiers. The interrogator informed
me that they knew that I was an important person in the
community and therefore could help them. As an inducement
10 for my cooperation, the interrogator offered medical help for
my injured hand. When I did not cooperate, the interrogator
asked me whether I considered the American army as
"liberator" or "occupier". When I replied that they were
"occupiers," he lost his temper and threatened me. He told
15 me that I would be sent to Guantanamo Bay where even
animals would not be able to survive.

20 They took me to another room, record of my thumb print,
photo of my eye, sample of my saliva for DNA analysis. They
tagged me, put a band round my wrist with the following
particulars: my name, a number, my religious status and
whether I had previous arrest.

25 They then beat me repeatedly, put me in a truck to transfer
me to another part of the Abu Ghraib prison.

30 This part of the prison, was in an open space and consisted of
five sectors, surrounded by walls and barb wires and was called
"Fiji Land". Each sector had five tents and surrounded by
barb wires. When I was removed from the truck, the soldiers
marked my forehead with the words "Big Fish" in red. All
the detainees in this camp are considered "Big Fish". This
was camp "B".

35 The living conditions in the camp were very bad. Each tent
would have 45 to 50 detainees and the space for each detainee
measured only 30cm by 30cm. We had to wait 2 to 3 hours
just to go to the toilets. Very little water. Each tent was given
only 60 litres of water daily to be shared by the detainees.
40 This water was used for drinking and washing and cleaning
the wounds after the torture sessions. They would also make
us to stand for long hours.

Sometimes, as a punishment, no food is given to us. When food is given, breakfast is at 5.00am, lunch at 8.00am, dinner at 1.00pm. During Ramadhan, they bring food twice daily, first at 12.00 midnight and the second is given during fasting time to make the detainees break the religious duty of fasting.

During my captivity in the camp, I was interrogated and tortured twice. Each time I was threatened that I would be sent to Guantanamo Bay prison. During this period, I heard from my fellow detainees that they were tortured by cigarette burns, injected with hallucinating chemicals and had their rectum inserted with various types of instruments, wooden sticks, pipes. They would return to the camp, bleeding profusely. Some had their bones broken.

In my camp, I saw detainees brought over from a secret prison which I came to know later as being housed in the "Arabian Oil Institute" building, situated in the north of Baghdad. These detainees were badly injured.

After one month, and just before sunset, my number was called and they put a bag over my head and my hands were tied behind my back. My legs were also tied. They then transferred me to a cell.

When I was brought to the cell, they asked me in Arabic to strip but when I refused, they tore my clothes and tied me up again. They then dragged me up a flight of stairs and when I could not move, they beat me repeatedly. When I reached the top of the stairs, they tied me to some steel bars. They then threw at me human waste and urinated on me.

Next, they put a gun to my head and said that they would execute me, kill me there. Another soldier would use a megaphone to shout at me using abusive words and to humiliate me. During this time, I could hear the screams of other detainees being tortured. This went on till the next morning.

In the morning, an Israeli stood in front of me and took the bag from my head and told me in Arabic that he was an Israeli

1 had interrogated and tortured detainees in Palestine. He
told me that when detainees would not cooperate, they
would be killed. He asked me repeatedly for names of
5 resistance fighters I told him that I do not know any
resistance fighters but he would not believe me, and
continued to beat me.

10 This Israeli dressed in civilian clothes tortured me by inserting
in turn first with a jagged wooden stick into my rectum and
then with the barrel of a rifle. I was cut inside and bled
profusely. During this time, when any guard walked past me,
they would beat me. I had no food for 36 hours.

15 The next morning, the Israeli interrogator came to my cell
and tied me to the grill of the cell and he then played the pop
song, "By the Rivers of Babylon" by pop group Boney M,
continuously until the next morning. The effect on me was
that I lost my hearing, which is permanent, and I lost my
20 mind. It was very painful and I lost consciousness. I only
woke up when the Israeli guard poured water on my head
and face. When I regain consciousness, he started beating me
again and demanded that I tell him of the names of resistance
fighters and what activities that I did against the American
25 soldiers. When I told him that I did not know any resistance
fighters, he kicked me many many times.

30 I was kept in the cell without clothes – that's nude – for two
weeks. During this time, an American guard by the name of
"Grainer" accompanied by a Moroccan Jew called Idel Palm
(also known as Abu Hamid) came to my cell and asked me
about my bandaged hand which was injured before I was
arrested. I told him that I had an operation. He then pulled
the bandage which stained with blood from my hand and in
35 doing so, tore the skin and flesh from my hands. I was in
great pain and when I asked him for some pain killers, he
stepped on my hands and said "this is American pain killer"
and laughed at me.

40 On the 15th day of detention, I was given a blanket. I was
relieved that some comfort was given to me. As I had no clothes
at all, he was nude, I made a hole in the centre of the blanket
by rubbing the blanket against the wall, and I was able to

cover my body. This is how all the prisoners cover their
bodies when they were given a blanket. 1

One day, a prisoner walked past my cell and told me
that the interrogators want to speed up their 5
investigation and would use more brutal methods of
torture to get answers that they want from the prisoners.
I was brought to the investigation room, after they put
a bag over my head. When I entered the investigation 10
room, they remove the bag from my head to let me see
the electrical wires which was attached to an electrical
wall socket.

Present in the room was the Moroccan Jew, Idel Palm, the
Israeli interrogator, two Americans one known as "Davies" 15
and the other "Federick" and two others.

They all wore civilian clothes, except the Americans who wore
army uniforms. Idel Palm told me in Arabic that unless I
cooperated, this would be my last chance to stay alive. I told 20
him that I do not know anything about the resistance. The
bag was then placed over my head again, and left alone for a
long time. During this time, I heard several screams and cries
from detainees who were being tortured.

25
The interrogators returned and forcefully placed me on top of
a carton box containing can food. They then connected the
wires to my fingers and ordered me to stretch my hand out
horizontally, and switched on the electric power. As the electric
current entered my whole body, I felt as if my eyes were being 30
forced out and sparks flying. My teeth were clattering violently
and my legs shaking violently as well. My whole body was
shaking all over."

In fact this was later exposed in the CBS News throughout 35
the world on 21st May 2004, and **this was the image that was,
the very famous image from that CBS May 2004.** This is it.

[Professor Nijar showing the newspaper cutting with the picture of
the man in the hood standing on a box] 40

1 I was electrocuted on three separate sessions. On the
first two sessions, I was electrocuted twice, each time
5 lasting few minutes. On the last session, as I was being
electrocuted, I accidentally bit my tongue and was
bleeding from the mouth. They stop the electrocution
and a doctor was called to attend to me. I was lying
down on the floor. The doctor poured some water into
my mouth and used his feet to force open my mouth.
10 He then remarked, "There is nothing serious, continue!" –
that's the doctor. Then he left the room. However, the guard
stopped the electrocution as I was bleeding profusely from
my mouth and blood was all over my blanket and body. But
they continued to beat me. After some time, they stopped
beating me and took me back to my cell.

15 Throughout the time of my torture, the interrogators would
take photographs – that's how the CBS News got this.

20 I was then left alone in my cell for 49 days. During this period
of detention, they stopped torturing me. At the end of the
49th day, I was transferred back to the camp, in "Tent C"
and remained there for another 45 days. I was informed by a
prisoner that he over heard some guards saying that I was
wrongly arrested and that I would be released.

25 I was released in the beginning of March 2004 – so he was
arrested 13 October 2003, the following year, he was released.
I was put into a truck and taken to a highway and thrown
out. A passing car stopped and took me home.

30 As a result of this experience, I decided to establish an
association to assist all torture victims, with the help of twelve
other torture victims. I feel very sad that I have to remember
and relive this horrible experience again and again, and I hope
35 that the Malaysian people will answer our call for help, God
willing.

40 And I make this solemn declaration conscientiously believing
the same to be true and by virtue of the provisions of the
Statutory Declarations Act 1960.

Named Abbas, and he signed it, Iraqi passport, so on. So that
is Ali Sh. Abbas.

And I just want to say that Ali Sh. Abbas at that time was living in Amman, Jordan, and now he is in Germany undergoing medical treatment, like I said, arising out of his condition.

And then we have **Rhuhel Ahmed**, British Passport number so and so, citizen of the United Kingdom. Now I just want to preface this by saying, and I will read this, in October, paragraph 4, he's a young boy at the time, 27 years old, in October 2001,

I and 3 of my friends Shafiq, Asif and Monir went to Pakistan for Asif's wedding and a holiday. We were there early about 3 weeks before the wedding and we toured part of Pakistan and later we decided to go tour Afghanistan. We went with an aid organisation from Pakistan that was taking food and medical aid to the poor in Afghanistan.

And in the record that I cited earlier, actually these were very young boys, on a frolic of their own, and he admitted before the Kuala Lumpur War Crimes Commission, he was quite frank, he said, "Look we went there because we can get ganja freely, nice holiday, wedding is about to start." And they just went for this spin in Afghanistan – in the wrong place, at the wrong time.

Five: We were in Kandahar when the bombing commenced by the United States of America. We stayed for 2 days and tried to get back to Pakistan. We were told that the border was sealed. The aid organisation members proposed that we follow them to Kabul where it was safer. We travelled by road to Kabul. We stayed here for 2 weeks.

We tried to get back to Kandahar to go back to Pakistan. We paid for the members of the aid organisation and ourselves to go back in a mini bus. We realised that the mini bus we had hired was taking a different route. We ended up Kunduz in Northern Afghanistan. We stopped at a Taliban base. Unknown to us, the members of the aid organisation were actually Taliban sympathisers and they stayed at the base. We were taken to a medium sized hut to stay. We were

1 *there for 2 weeks. We were supplied by food and were free to
move around the town.*

5 *During this period the Taliban had lost control of Afghanistan. The
Taliban negotiated with the Uzbek warlord General Dostum for a
safe passage to Kandahar. On our way out of Kunduz there was a
heavy attack launched by American helicopter gunships that pounded
the area. I lost my friend Monir during this attack – there were
3 friends who went there, so 1 died.*

10 *A Taliban convoy came and picked us up on our way to General
Dostum – the warlord. When we reached there we were all detained.
Our belongings including those of the Taliban were taken away.*

15 *Moazzam Begg testified that there were a lot of bounty
hunters. You know, the Americans were paying big bucks,
US bucks, for anyone delivered, and so this was part of that
scheme – all those detained, sold to the Americans.*

20 *Number 9: We were marched on foot in the desert without food and
water for 2 days. And then we were put on trucks and taken to
Mazar-E-Sharif. During this journey I saw United States soldiers
close by on jeeps and sand buggies.*

25 *In Mazar-E-Sharif we saw photographers and saw containers made
of metal and some by canvas. We were put in these containers. There
were more than 200 people placed in each container. I was in a
container covered by canvas and tore part of the canvas to allow
some air in. Those in the metal container suffocated and many died.
30 General Dostum's forces then shot the bottom sides of the containers
on the basis to allow air into the containers for the people to breathe.
But this resulted in killing and wounding people. My friend Asif –
the bridegroom to be – was injured by a bullet.*

35 *We were then driven to Shabargham prison that took almost a day.
There were hundreds of trucks there. Ditches were dug and those in
the containers who were dead due to suffocation including those
who were wounded were all thrown into the ditches and bulldozers
covered the ditch with sand. Many who were alive but unconscious
40 or wounded were buried alive. My friend Asif managed to survive.*

In the prison we were beaten first before being put in cells. I and my other friend Shafiq looked out for Asif. And later Asif was put in to our cell. His gun shot wound was only treated with iodine and bandaged. Each cell was about 5 meters by 5 meters with about 40 people. For one week we were just given very little bread and some water.

A week later the ICRC came and gave us some additional food and water – so there was again they were ‘disappeared’ from the radar of the Geneva Conventions, as my colleague so succinctly put forward this morning.

We were never questioned by anyone. I could see American soldiers around the prison. On 31 December 2001 prison guards came and asked for English speaking prisoners. I volunteered. My feet and hands were tied and taken to see some American soldiers. They stripped me and checked for bullet wounds and injuries. I told them my story and that I was a British citizen. I was told that I was under American custody and would be treated better.

And this was the better – I was then hooded and taken to a room and punched. Then I was put we on a truck and taken to an airport. In the plane we were made to lie down and we were beaten and kicked by the American soldiers.

We were taken to Kandahar and we were tied and a rope was tied to our arms to and led around with hoods on our heads. We were told to sleep and within a few seconds we were told to start walking. A soldier pushed me down and another sat on me and cut up my clothes. They took swabs of my saliva, a strand of my beard, finger printed and photographed.

We were in a hangar. We were given wrist bands with numbers. My number was 102. The next day I was taken for interrogation. I was hooded, feet were chained together and hands handcuffed. I was interrogated and told they will inform the British authorities. I was given a blue jump suit. The days were very hot and the nights very cold. There were no blankets provided in the cold night.

The soldiers would do head counts once or twice during the day. During the night it was done every half hour or so which I believe was to prevent us from sleeping. I was in Kandahar for 6 weeks and

1 interrogated on and off during this period by the US military
intelligence and the FBI (they wore caps and jackets with the words
'FBI'). These interrogations were done at gun point and I would get
punched and kicked.

5 My hands would be handcuffed at my back and my arms would be
pulled till my shoulders felt they were going to come out of their
sockets. My legs would be chained and I would be asked to
put my legs apart and then while holding my arms they would
10 kick down on the chain which caused a great amount of pain
with resulting in cuts and bruises.

15 The soldiers would randomly conduct searches of our cells and
whenever they found a Quran they would throw it down on the
floor and step on it.

20 I and the other detainees had lice. One day we had a shave and lice
treatment. We were then put on a military plane. A chain was placed
across my body on the seat. Goggles were placed on my eyes to
prevent me from seeing. My hands had mittens and were then duct
taped. We were given some food that was placed on our hands but
we could not eat because our hands were tied.

25 When I went to the toilet a female soldier followed me to the toilet
and pulled my pants down and wiped me after that. It was extremely
humiliating and embarrassing for me to be out in that position.

30 We landed some hours later at destination that was very hot and we
changed planes.

35 Many hours later we landed again. We were placed on a truck and
kicked and punched. We were then put on a ferry and asked to sit in
a particular manner. I was kicked many times on my left thigh when
ever my seating position changed. It was extremely painful and my
leg swelled badly.

40 We reached camp X Ray and stripped and checked us. After that we
were put in a cell that was 2.5 by 3 meters. Given a blanket and
insulation mat to sleep on. The floor was cement and the walls and
roof was made of some softer material. Much later I knew that we
were in Guantanamo Bay, in Cuba.

So from Afghanistan they were carried in this position right
across the other side of the world in Guantanamo Bay. 1

The next day I was interrogated and questioned about my personal
background and family details. The day after I was interrogated by
British intelligence on my background. I asked that I be released but
were told they could not do anything about it as I was in American
custody – this is what the British intelligence said. While being
taken to and returning from these interrogations I would be
kicked and punched by the American soldiers. 5 10

The Americans showed me photographs taken from a video that they
called they “Turnip Farms” which was taken in Afghanistan showing
Osama bin Laden giving a speech. The Americans alleged that I was
in the video along with my friends I denied these allegations. 15

In 2003 the interrogations got worse. My hands and feet would be
cuffed together and it would be an extremely difficult position for
long periods. Played loud music with strobe lights for hours to force
a confession out of you. These intense interrogations continued for
about 5 months from the middle of 2003. And I was put in solitary
confinement during this period. 20

Sometime during the end of this period of 5 months the British
intelligence confirmed – which is what he’s been saying all the
while – that their records showed that I was in the United Kingdom
during the time the alleged video mentioned above was filmed. They
also said that unless I was using a false passport to travel at the said
time. 25 30

After this, the intense interrogation ceased and I was taken out of
solitary confinement. The regular interrogations continued and so
did the abuse of punching and kicking.

In the last 3 months I was there the abuse stopped. I was released in
March 2004 – so several years later, he was released from
Guantanamo. 35

The whole experience has affected my family and my life in a very
severe way. I lost 2½ years of my life for something that I did not do.
I feel that the government of the United States of America and
whichever government or governments that were involved should 40

1 be brought to justice to bring closure for all the victims of this
grave injustice that has been perpetrated on innocent civilians.

5 And I make this solemn declaration conscientiously believing the
same to be true and by virtue of the provisions of the Statutory
Declaration Act 1960. Subscribed and solemnly declared by the above
named RHUHEL AHMED, 20th October, 2009, and it bears
the signature of Rhuhel.

10 That concludes the testimony part of the prosecution's
evidence. As I intimated this morning, all this kind of acts
that were inflicted have been very ...

Jason Kay Kit Leon:

15 May I assist the Court on this point, on these 2 Statutory
Declarations.

Judge Lamin Mohd Yunus (President):

Yes.

20 Jason Kay Kit Leon:

Thank you. I will need about 5 to 10 minutes.

25 The first point, of course, which I have given notice to the
prosecution would be as to the acceptance of these 2 Statutory
Declarations – Article 10 or the Rules of Procedure for the
Tribunal, it is at page 36,

30 ***"The evidence of witnesses shall be by way of Witness Statements
in the form of an affidavit. The witnesses are required to file Witness
Statements and such statements – this is the important part – shall
be read by the witnesses at the trial."***

35 I just wish to bring the Tribunal's attention to that particular
part. The words used is ***"shall"***. That is the first point I wish
to make.

40 Having perused the statutory declaration of Ali Sh. Abbas @
Ali Shalal, which, I believe, has been marked as P4, I noticed
that at the final page, the page number is 1189, the signature
portion,

"Subscribed and solemnly declared by the above named ALI SH. ABBAS ALIAS ALI SHALAL on 03 February 2007 at Kuala Lumpur through the interpretation of ABBAS Z. ABID (Iraqi Passport No. S379532) with the said ABBAS Z. ABID having been first affirmed that he had truly, distinctly, and audibly translated the contents of this Statutory Declaration to the deponent ALI SH. ABBAS ALIAS ALI SHALAL"

I just request the prosecution: Is this the same Abbas Z. Abid that was witness number 1 yesterday? 10

Gurdial Singh Nijar:

Yes, it is the same one.

15

Jason Kay Kit Leon:

Thank you. I shall reserve further submission on this at the more opportune time.

I have only 2 further points to make: First, that when the prosecution admits that Rhuhel admitted he went to Afghanistan to smoke ganja and, unfortunately for the witnesses Ali Shalal and Rhuhel, we do not have the benefit of their presence in the Tribunal for further clarification via question that I may, on behalf of the Tribunal, pose some questions to him, to them, either of them, and perhaps certain parts of their testimony, their account, of what happened might have been missed out by the statutory declaration, and that is unfortunately one of the dis-benefits of not having a witness present. I will submit further on this. 20 25 30

If the Tribunal may ... may I borrow that, with the Tribunal's leave, of course.

Judge Lamin Mohd Yunus (President):

Yes.

35

[Jason taking the newspaper clipping]

Jason Kay Kit Leon:

May I have the Tribunal's leave to paste it up on there for awhile? Thank you.

40

1 Judge Lamin Mohd Yunus (President):
You put it up for whose benefit?

Jason Kay Kit Leon:
5 I wish to make a point.

Judge Alfred Webre:
Counsel, could you identify that photo because we have no
idea ...

10 Jason Kay Kit Leon:
That is the photo ...

Judge Lamin Mohd Yunus (President):
15 This page is it?

Jason Kay Kit Leon:
Counsel for the prosecution has identified, has asserted, that
20 the man in the picture is Ali Sh. Abbas @ Ali Shalal. I believe
that was asserted just now during the reading of his statutory
declaration. *There might be a bit of a problem with that
assertion.*

25 That is the most famous picture to have come out from the
war. The man, in a hood, arms a stretch, standing on a box.
This is the most famous picture to have come out from this
entire sordid thing that has happened. The assertion is that
Ali Sh. Abbas was that man.

30 I refer, there are 4 articles here, it's all from the New York
Times. The first is the article that appeared on March 11, 2006,
under the heading, "*Symbol of Abu Ghraib seeks to spare others
his nightmare by Hassan M. Fattah*". Now, basically, at page 2,
if Your Excellencies will turn with me, ...

35 Judge Lamin Mohd Yunus (President):
... issue of identity if he is unable ...

Jason Kay Kit Leon:
40 There was an assertion made by ...

Judge Lamin Mohd Yunus (President):
With the hood on?

1

Jason Kay Kit Leon:

Yes. Ali Abbas has asserted, made assertions that he is that man in the hood. It has been said by the prosecutor himself, just now, in his submission.

5

Gurdial Singh Nijar:

Yes, in fact we just showed this to demonstrate the fact that this is how he was electrocuted – he was made to stand on a box and he was electrocuted. Indeed, when he testified before the Kuala Lumpur War Crimes Commission, I can make that record available, in 2007 in Kuala Lumpur itself, he also demonstrated and gave identical evidence as to the way he was treated and the impact of that electrocution.

10

15

Jason Kay Kit Leon:

We unfortunately do not have Ali Shalal, Ali Sh. Abbas, here to confirm whether or not he was that man on the box. Now apparently, apparently he does say that he is. He even has business cards, according to the New York Times article, of course, business cards with the photo on his business cards – it's his trademark, if you will.

20

But this article that appeared first identified him as the person. There was an editor's retraction – the New York Times actually published a retraction, sorry, Editor's Note, to this March 11 article, 2006 – that Editor's Note is at page 4 of the bundle. It reads, and this came out about 1 week after:

25

"A front-page article last Saturday profiled Ali Shalal Qaissi, identifying him as the hooded man forced to stand on a box, attached to wires, in a photograph from the Abu Ghraib prison abuse scandal of 2003 and 2004. He was shown holding such a photograph. As an article on Page A1 today makes clear, Mr. Qaissi was not that man."

30

35

Judge Alfred Webre:

Counsel, we're talking about P4, correct? The statutory declaration. Could you point to me where in statutory declaration, P4, the photograph is mentioned?

40

1 Jason Kay Kit Leon:
Nothing. It's not there.

Judge Alfred Webre:
5 Okay. So ...

Jason Kay Kit Leon:
A submission was made, a comment was made, by counsel
for the prosecution linking Ali Shalal to the man.

10 Judge Alfred Webre:
I'm confused. I had thought that counsel for the prosecution
just stated that this matter had been clarified. Is that not
correct?

15 Gurdial Singh Nijar:
Yes. The fact is that this is the manner in which, I said this is
exactly the manner in which this man was placed on a
cardboard box with electrodes applied to his fingers, to his
20 private parts, and that's where the matter rests. Now the main
point is whether or not, as he says in the statutory declaration,
he was tortured in this particular matter. Right?

If my learned friend says, "*He's not the man, but that there was
25 another man that was similarly tortured,*" I'm fine with that. I'm
fine with that admission. Because I don't want to labour the
point.

Jason Kay Kit Leon:
30 Exactly.

Gurdial Singh Nijar:
Because he's not here to clarify this one way or the other.

35 Jason Kay Kit Leon:
Exactly. *And that goes to whether Ali Shalal is a truthful
witness or not. Credibility.* Witnesses come to a Tribunal, to
Court, to give evidence under oath – he also gave his statutory
declaration under oath ...

40 Judge Lamin Mohd Yunus (President):
If he has given under oath, and now you say, somebody says
this is not that man, somebody else, similarly robed, tortured,

and you say it's credibility. That doesn't lead to credibility. 1
Merely a presentation of the photograph. Leave it to us. Either
you oppose the presentation of the photograph, or you just
want to put it there as an example to relate to your story,
whichever way it is. It's up to us. 5

Jason Kay Kit Leon:

Then I just wish for 2 clarifications: One, is the prosecution
adducing that picture into the evidence? That's the first
question. 10

And the second question: Is the prosecution making an
assertion that that person in the photograph is in fact Ali Shalal
who has sworn this statutory declaration? And are they
tendering this statutory declaration into the record? 15

I only need those 2 clarifications.

Judge Lamin Mohd Yunus (President):

Alright, alright. 20

Francis Boyle:

Your Honour I just wanted to draw one consideration, your
attention, again, we are seeking admission of this witness'
declaration under Article 24 as secondary evidence which may 25
be admissible in the interest of justice. That's what we're
asking for here.

As for the New York Times, and the New York Times being
cited here in this Court, I think is a joke and a fraud. The New 30
York Times is a Zionist-front organization. It is owned and
operated by Zionist for the purpose of promoting Zionism
and Israel, and it that capacity it fully supported the war
against Iraq from the beginning through the end. It has every 35
interest in the world to debunk, discredit, downplay any
allegations made against United States armed forces with
respect to atrocities in Iraq.

That being said, however, we submit that this is still secondary 40
evidence that should be admissible in the interest of justice
under these circumstances, that the witness could not come

1 because he's obviously suffering from post-traumatic-stress
disorder.

5 And you have to be very sceptical of anything appearing in
the New York Times with respect to Iraq because they
supported every atrocity that was ever committed in Iraq, not
only in the recent war by Bush Jr., but also in the war by
Bush Sr.

10 Thank you.

Jason Kay Kit Leon:

Your Excellencies, may I reply that point? ... May I reply the
point made by Professor Boyle?

15 **Judge Lamin Mohd Yunus (President):**
Yes.

Jason Kay Kit Leon:

20 Thank you.

As to whether the New York Times is a Zionist-whatever, may
I refer to an editorial in the New York Times dated June 6,
2008, *"The Truth About The War,"* it is titled.

25 In paragraph 2 it refers to, the second last line in paragraph 2,
a report by the *"Senate Intelligence Committee"*. Paragraph 3,
I'm reading from paragraph 3, this is from the New York
Times, supposedly Zionist-whatever. Paragraph 3 – this is the
30 New York Times speaking, in an Editorial,

35 *"The report shows clearly that President Bush should have
known that important claims he made about Iraq did not
conform with intelligence reports. In other cases, he could
have learned the truth if he had asked better questions or
encouraged more honest answers."*

Without wasting time, let us go to the last paragraph, second
two last paragraphs. The second-last paragraph on page 2.

40 *"Claims by Mr. Cheney and Mr. Rumsfeld that Iraq had
longstanding ties to Al Qaeda and other terrorist groups also were*

false," – were "FALSE" – New York Times, editorial, Zionist paper, calling Mr. Cheney and Mr. Rumsfeld, talking about Iraq, "false"; 1

"and the Senate committee's report shows that the two men knew it, or should have." – we're talking about Cheney and Rumsfeld, accused number two and three – New York Times is ... well, New York Times is being quite "critical" of accused two and three. 5

Last paragraph: *"We cannot say with certainty whether Mr. Bush lied about Iraq. But when the president withholds vital information from the public,"* – New York Times is saying accused number one is withholding vital information from the public in an editorial, *"or leads them to believe things that he knows are not true – to justify the invasion of another country,"* – we are talking about that right now, *"that is bad enough."* 10 15

So, my humble submission: I think, New York Times – we can rely on their "Editor's Note". And I'm sure, I think, prosecution *might* want to rely on this editorial. 20

Francis Boyle:

Your Honours, this editorial was June 6, 2008. It was well after 5 years after Bush Jr. had invaded Iraq and said, *"Mission accomplished."* While the invasion was going on, and even before the invasion, the New York Times fully supported the entire invasion and everything Bush Jr. was doing. Only 5 years later did they finally shed a few crocodile tears to cover their tracks and make it appear as if they hadn't supported the war. 25 30

But the bottom point is here at the end, *"We cannot say with certainty whether Mr. Bush lied about Iraq."* Of course he lied about Iraq. We already determined that in the last proceeding, did we not? In the *"Crime against Peace."* So here's the New York Times saying, 5 years later, *"Well, we still don't know if he lied about Iraq."* 35

Second, as for the so-called weapons of mass destruction, the New York Times deliberately published the series of articles by Judith Miller promoting the fact, alleged fact, that Iraq had 40

1 biological weapons when everyone knew Saddam Hussein
no longer had biological weapons. The New York Times
published it. It was propaganda designed to promote war
against Iraq. Everyone knew it at the time, and eventually the
5 scandal was so bad that they fired Miller; but they never really
apologised for having mongered the war against Iraq from
the very beginning until after the invasion.

10 So again, this is 5 years after the invasion where finally they're
saying the minimum amount they can to maintain credibility.
If you are interested, there is a book by Professor Fogg(sp?)
debunking the New York Times' coverage on Iraq at great
length, which I don't have here with me. But they are a
15 completely unreliable, un-credible source, and in fact basically
a source of government propaganda and disinformation going
back to the classic work by Chomsky and Herman,
"Manufacturing Consent," during the Vietnam War where
Chomsky and Herman documented at great length that the
20 New York Times was nothing more than a propaganda organ
for the United States government. And the Falk book did the
exact same thing all over again for the New York Times against
Iraq.

25 So, the bottom line is, we are not submitting this as primary
evidence. We are submitting it as secondary evidence under
Article 24, unlike the evidence of the 3 witnesses we already
have, which is primary evidence. We admit that these 2
individuals, victims, are not here to subject themselves to
cross-examination. We're submitting them under Article 24.
30 We're asking for the Tribunal to decide finally on the total
weight of the evidence, with due regard being given to
primary evidence. So the primary evidence, with the 3
witnesses we already have; we admit this is secondary
evidence, but we think this is sufficient evidence. The
35 statements were given under oath.

40 And we're asking to simply discount what the New York
Times has to say about this picture, as Judge Webre correctly
pointed out – there is nothing in the statutory declaration
where this victim refers to this picture one way or the other.
It isn't in it. Thank you.

Gurdial Singh Nijar:

And Your Honours, on the first question raised by my learned friend: He says the Article 10, *"The evidence of witnesses shall be by way of Witness Statements in the form of an affidavit,"* I suggest that we read that whole article 9 and 10 together.

[Article] 9 says, *"The evidence of witnesses shall preferably be in the form of a written testimony/affidavit with exhibits of the relevant documentary and photographic evidence."*

So there is no absolute rule that prohibits the evidence of, the question under Article 10 that it must be read by the witnesses. And as we submit, it is secondary evidence. You are allowed to have secondary evidence, hearsay evidence, and this is not exceptional because even under the charter, under the International Criminal Court, these rules are derived from various international documents where secondary evidence is allowed but the weight to be attached to this will have to be determined in your absolute, in Your Honours' absolute, discretion, taking into account the totality of the rest of the evidence to see whether to what extent ...

And that is why after this we would be asking for the documentary that was referred to by prosecution witness number 2, Mr. Moazzam Begg, *"Taxi To The Dark Side."* It's a documentary, the award-winning documentary. And all that what we have been talking about, the kind of treatment that is given, is depicted there from real-life photographs. And I think that, as I've said, a picture speaks a thousand words; and a digitalized video today speaks maybe a million words.

And so I would suggest that we can take into account the views of learned counsel, but then we move on to, unless he's suggesting that this be struck out from the record?

Jason Kay Kit Leon:

No. I just wish the articles from the New York Times that I have passed to the Tribunal be considered in its deliberation. That is all I'm asking. I am here to assist the Tribunal in portions which it may have overlooked.

Gurdial Singh Nijar:

1 Yes, we have no objections to the inclusion of that articles for
the consideration, in the ... Yes, as part of the evidence and
what ruling is going to be made it will be left entirely to Your
Honours complete discretion.

5 With that Your Honour, save for the documentary that we
would like to show now depicting the conditions that we are
talking about. We trust that, we do not know whether defence
has any objections to the ... yes, he's intimated by his body
10 gesture that he has no objections. So the prosecution
respectfully requests that that video be now shown. Thank
you, with your leave.

[Start of video – “Taxi To The Dark Side”]

15 *YAKUBI, AFGHANISTAN*

[Afghani Man] Dilawar was a quiet, hard-working person. A good
and honest man. From the time he was a little boy, he loved to
20 drive the tractor. He brought stones down from the mountain.
All the stones in this wall, Dilawar bought them all here. We are
peanut farmers, but we told him: “We will work the fields and
you can drive the taxi.”

25 *JIGSAW PRODUCTIONS PRESENTS*

IN ASSOCIATION WITH TALL WOODS, LLC

AND WIDER FILM PROJECTS

30 [Narrator] On December 1, 2002, Dilawar, a young Afghan taxi
driver, took three passengers for a ride. He never returned home.

SECRET

35 *TAXI TO THE DARK SIDE*

Afghanistan 2002

40 *Bagram Air Base, Afghanistan*

[Sgt. Thomas Curtis, Military Police, Bagram] When the sun
started to go down, the sand started blowing. It was like a big

dust bowl. And I'm thinking, "*Boy, is it going to be like this every night?*" 1

[Pfc. Damien Corsetti, Military Intelligence, Bagram] I remember walking in to there for the first time: The smell — the smell is the first thing that hits you. And being from D.C., if you've ever been to the National Zoo, when you walk into the elephant house there, that's the best way to describe it. There were a few of us that lived in the prison, and I was one of them. 5

Bagram Prison 10

They built it up to be a big, scary place to the prisoners.

[Narrator] After the invasion of Afghanistan, U.S. Forces occupied Bagram, an old Soviet airbase as a place to collect and interrogate thousands of detainees captured throughout Afghanistan and Pakistan. 15

[Sgt. Thomas Curtis, Military Police, Bagram] These were suspected Taliban. They were being caught by Special Forces throughout the countryside, brought to Bag to be held, interrogated, determined if they were a high-value prisoner. 20

[Sgt. Anthony Morden, Military Police, Bagram] These were not nice people at all. They were very evil people who, you know, definitely had violent intentions. 25

[Narrator] On December 5, 2002, Dilawar, the taxi driver, was brought to Bagram. He was designed a PUC: Person Under Control, No. 421. 30

[Sgt. Anthony Morden, Military Police, Bagram] He was something to do with a trigger man for a rocket attack. And that's about all I know. 35

[Narrator] Five days after his arrival, he was dead.

[Sgt. Thomas Curtis, Military Police, Bagram] I would say this was around about 0500 in the morning. As I walked by Dilawar — I think that's his name, Dilawar — walked by Dilawar's cell, I noticed that he was just kind of hanging there with his head 40

1 down. But he was being too still to be just — you know,
hanging there, sleeping.

5 [Sgt. Anthony Morden, Military Police, Bagram] Sgt. Curtis
opened up the door, and we went in. He was unresponsive.
And we started CPR.

Military Investigation Reenactment

10 [Pfc. Willie Brand, Military Police, Bagram] I was downstairs in
general population. Then I heard a call come in asking for a
chemic to come upstairs. He was a medic, and we carried him
downstairs on a stretcher.

15 *Spc. Brian Cammack, Military Police, Bagram, Afghanistan*

20 And the chemic was still on top of him while we're carrying him
down, still trying to get him back going, all the way down the
stairs. We got him through the front door and they kept working
on him, kept working on him until the doctor got there and
pronounced him dead.

25 [Sgt. Thomas Curtis, Military Police, Bagram] I don't know if it
was an injury that was aggravated by something, or whether he
was just sick coming in.

30 [Pfc. Damien Corsetti, Military Intelligence, Bagram & Abu
Ghraib] They are very frail people, and I was surprised that it
had taken that long for one of them to die in our custody.

[Sgt. Thomas Curtis, Military Police, Bagram] There was a definite
sense of concern, because he was the second one.

35 [Narrator] Just a week before Dilawar's death, another detainee
at Bagram had died.

[Sgt. Thomas Curtis, Military Police, Bagram] You know, you
wonder: Is this something we did? Or did somebody kill him or
something? But I just didn't know.

40 [Narrator] According to the medical examiner, the first detainee
to die, Habibullah, had a preexisting pulmonary condition. But

it was the beatings he sustained at Bagram that led to the cause
of his death: a bloodclot that traveled to his lungs. 1

[Pfc. Damien Corsetti, Military Intelligence, Bagram & Abu
Ghraib] When the second one died a week later, that's when 5
it was like, "*Oh, crap! Something's going to happen now.*"
That's two prisoners dying within a week of each other. That's
bad.

[Narrator] A preliminary investigation into Dilawar's death, 10
revealed deep bruises all over his body. But it did not conclude
that his treatment at Bagram was to blame.

[Sgt. Thomas Curtis, Military Police, Bagram] The next day, they
said, "*Draw out how he was shackled up here.*" And I made 15
that crude drawing. The ceiling of these isolation rooms was
just a simple metal grate, and it was thick enough you could put
handcuffs, you know, through the wires of that ...

Military Investigation Reenactment 20

and you just kind of chain them up like that, out to the sides,
like this.

[Narrator] Forced standing for long periods had inflamed tissue 25
damage from blows to Dilawar's legs. But the initial Bagram
press release failed to mention overhead shackling and beatings.
It declared that both detainees had died of natural causes.

[Sgt. Anthony Morden, Military Police, Bagram] My opinion is 30
that the military wanted to get this over, and get this done quickly,
before it really got noticed.

[Narrator] Soon after Dilawar's death, the officer in charge of 35
interrogation at Bagram, Captain Carolyn Wood, was awarded
the bronze star for valor. Following the Iraq invasion, Wood
and her intelligence unit, were given a new assignment: Abu
Ghraib.

A FEW BAD APPLES 40

1 [Eric Lahammer, Military Intelligence, Bagram & Abu Ghraib]
The only thing I can really remember about Abu Ghraib was the
heat. It was like 148 degrees or so. And it was all concrete. Abu
Ghraib also had the infamous torture chambers and stuff left
5 from Saddam's era. I remember walking through those and seeing
like fingernail marks on the walls, and bloodstains, and
guillotines and stuff like that. It was a pretty surreal feeling.
We went to Abu Ghraib, I believe in July. July or August of
2003 to start that prison.

10 [Pfc. Damien Corsetti, Military Intelligence, Bagram & Abu
Ghraib] You put people in crazy situations, and people do crazy
things. And Abu was getting mortared every night. These 120
mm. mortars killing prisoners. The first time that happened, they
15 should have evacuated those prisoners to somewhere else,
because the prisoners weren't safe.

20 [Sgt. Ken Davis, 372nd MP Company, Abu Ghraib] People were
being told to rough up Iraqis that wouldn't cooperate. We were
also told that they were nothing but dogs. Then, all of a sudden,
you start looking at these people as less than human. And you
start doing things to them you would never dream of. And that's
where it got scary.

25 [US Chief of Staff, Richard Myers] It was only the night shift.
There's always a few bad apples.

30 [Donald Rumsfeld, Secretary of Defense] It's been a body blow
for all of us.

[Lt. General Ricardo S. Sanchez] This is clearly an isolated
incident.

35 [General Geoffrey D. Miller] The conduct of a very, very small
number of our leaders and soldiers.

[Narrator] In the wake of media attention surrounding Abu
Ghraib, the military began a series of investigations.

40 [Secretary of Defense Donald Rumsfeld, Abu Ghraib, 2004] The
people who engaged in abuses will be brought to justice. The

world will see how a free system, a democratic system, functions and operates transparently with no cover-ups. 1

Newsweek: Is He to Blame? Special Report: Rumsfeld and the Road to the Prison Abuse Scandal 5

[Rear Admiral John Hutson, (ret) Judge Advocate General] The Secretary and others have said, “Well, you know, we’ve conducted 12 investigations” — each and all of which were geared to looking downward, down toward Lynndie England and Graner, and not looking up. 10

Pfc. Lynndie England, sentenced to 3 years in prison.

Spc. Charles A. Graner, sentenced to 10 years in prison. 15

[Narrator] The soldiers in the photos are military police, or MPs, whose job it was to guard and protect the prisoners. In their statements, the MPs claimed that Military Intelligence, or MI, ordered them to weaken, humiliate, and break the prisoners for interrogation purposes. 20

[Spc. Tony Lagouranis, Military Intelligence, Iraq] Obviously, you know, what they were doing, in those pictures, was not sanctioned by the Interrogation Rules of Engagement. And they weren’t interrogators. So yes, I did think that they were bad apples. However, I also think that they were taking cues from Intel. 25

[Sgt. Ken Davis, 372nd MP Company, Abu Ghraib] This reading report said it was happening in Afghanistan. I mean, humiliation, trying to break people came from somewhere. MPs didn’t think of it. MPs were not ever trained in such things. We should never have been “breaking” anybody. 30

[Pfc. Damien Corsetti, Military Intelligence, Bagram & Abu Ghraib] I can tell you, we set the same policies in Abu as we set at Bagram. The same exact rules. The same thing was going on. And they wonder why it happened. (Laughs sadly.) 35

[Narrator] In her sworn testimony about Abu Ghraib, Capt. Wood said she felt pressured to produce intelligence, so she brought 40

1 unauthorized techniques: dogs, nudity, sleep deprivation and
stress positions to Abu Ghraib from Afghanistan. Wood
maintained that the Bagram model had tacit approval from
superiors. But U.S. Central Command had never responded to
5 her requests for authorization. So the mystery remained. Was
Abu Ghraib the work of a few bad apples? Or evidence of a
new world-wide system of detention and interrogation?

10 [Spc. Tony Lagouranis, Military Intelligence, Iraq] I'm pretty sure
that interrogators were telling the guards: *"Strip this guy naked,
chain him up to the bed in an uncomfortable position, you know,
do whatever you can."* And then they decided to take it one
step further and have some *"fun,"* and take pictures.

15 [Colonel Lawrence Wilkerson, Chief of Staff to Colin Powell
2002-2005, 31 years in the Military] You've always got people
in the military who are just this side of the Marquis De Sade,
and one of the reasons you want rules and this code of conduct
to help you lead mud rings and mud runs — infantry — is so that
20 you can use those tools to restrict this tendency in your soldiers.
When you have your friends dying on you left and right, you
can sometimes go beyond the pale. So a lieutenant, a captain
down where the rubber meets the road, needs these tools. And
he needs to be able to punish people who cross the line.

25 *Colonel Lawrence Wilkerson, Chief of Staff to Colin Powell 2002-
2005*

30 When the secretary walked through my door into my office about
the time the photos of Abu Ghraib were getting ready to come
out, and we had rumor that they were coming out, he said to
me, *"I need to know what happened and why."* And so then I
began to build both an open source and inside the government,
classified and unclassified, document file. And I began to see
35 legal arguments as to why the President could pretty much do
anything he wanted to in the name of Security. And the Secretary
of Defense, and others beneath him, were actually looking for
the twin pressures that they put on people. That is to say, the
pressure to produce intelligence. And the fact that they were
40 saying *"the gloves are off,"* created the environment in the field
that we later saw reflected in the photographs from Abu Ghraib.
And in my view, far more serious fashion than the photographs

we saw, were 98 deaths of people in detention, which I understand now from my army colleagues is up to some 25 of which have been declared officially by the Army as homicides.

1

** since this interview, the number of deaths has risen to 105*

5

** since this interview, 37 have been classified "homicides"*

People say, "Well, these photographs from Abu Ghraib, they weren't real torture." I look back at those people and say, "Murder is torture. Murder is the ultimate torture." In the case of Dilawar, he was subject to — certainly — cruel and unusual punishment, and ultimately, he was subject to torture because he died.

10

15

[General Dan McNeill, Commander of Coalition Forces, Afghanistan 2002-2003] It's not our intent for people to die, especially when we're seeking to get information from them.

20

General Dan McNeill, Commander of Coalition Forces, Afghanistan 2002-2003

[Carlotta Gall] Did the treatment they received in those rooms cause the death of these two men?

25

[General Dan McNeill, Commander of Coalition Forces, Afghanistan 2002-2003] First, we're not chaining people to the ceiling. I think you asked me that question before.

30

[Carlotta Gall] *"First, we're not chaining people to the ceiling."* That's what he says.

[Narrator] Carlotta Gall is a New York Times journalist based in Kabul. Unsatisfied with the Military's explanation of the two deaths at Bagram, she set out to investigate.

35

[Carlotta Gall] It took a long time to find the family because the Military didn't tell us who they were. And we started calling around: Governors. They are a very simple farming family. They don't speak English. But they showed me a paper that was given to them with the body. And that's when I opened it up and read

40

1 it. It was in English. And it was a death certificate from the
American Military. And it was signed by a U.S. Major who was
the pathologist. And of the four boxes, she checked the box for
Homicide. I said, "*My God, they've killed him.*" And we then
5 had to tell the family, "Do you know what's written here?" And
they said, "*No, it's in English. We don't understand.*" And I
think maybe the Red Cross who helped return the body had
explained, but they hadn't taken it in. And then the Pathologist
had said it was this blunt force trauma to the legs.

10 [Carlotta Gall] Did they receive any trauma? Any blunt injury
trauma, as we call it?

15 [General Dan McNeill, Commander of Coalition Forces,
Afghanistan 2002-2003] Presently I have no indication of that,
but we will be looking as this investigation continues to go down
its due course.

20 [Carlotta Gall] "*Presently have no indication of that.*" You know,
there's been a death certificate signed by his people and he says,
"*Presently I have no indication of any blunt force trauma.*" And
it's written on the death certificate which I've seen.

25 [Tim Golden, New York Times Reporter] The story probably
would have gone away had it not been for my colleague, Carlotta
Gall, who tracked down Dilawar's family and found the knife-
in-the-back clue that told everyone that this incident had been
something other than the Military portrayed.

30 *Dilawar's father & daughter*

Tim Golden, New York Times Reporter

35 [Narrator] Tim Golden picked up the trail of the story and
obtained a confidential file of the Army investigation, including
hundreds of pages of testimony from the soldiers involved.

40 [Tim Golden, New York Times Reporter] Part of what made the
story compelling to me was that you had these young soldiers
with very little training or preparation, thrown into this situation
in the aftermath of 9/11, just as the rules were changing.

Bagram, Afghanistan

And they weren't told what the new rules were. And you had this young Afghan man who came into this system at the wrong time, in the wrong way. And this is what happened to him.

[Sgt. Thomas Curtis, Military Police, Bagram] I saw his picture in the New York Times article. Before that picture, I couldn't have picked his face out, you know. My memory of him was chained up, with the hood on, though sleeping.

[Narrator] Following questions raised by the New York Times, and under scrutiny about the Abu Ghraib scandal, the Army finally stepped up the Dilawar investigation, and began charging soldiers with maltreatment, maiming and homicide.

[Sgt. Thomas Curtis, Military Police, Bagram] When you're working, you know, with an organization like the Military, you know, they are going to hold somebody accountable. You can sweep some things under the rug, but, you know, this was a death. There was two deaths. And okay, fine, they are going to charge people.

Sgt. Thomas Curtis, 377th Military Police Unit, Bagram, Afghanistan

[Sgt. Anthony Morden, 377th Military Police Unit, Bagram, Afghanistan] It seemed like the Military, now after they got a black eye from Abu Ghraib, wanted to get a public opinion that they were policing their soldiers. And so they said, "We had this incident that happened a couple of years ago. We could still prosecute some of them."

Sgt. Anthony Morden, 377th Military Police Unit, Bagram, Afghanistan

[Pfc. Willie Brand, 377th Military Police Unit, Bagram, Afghanistan] I had nothing to do with the Military for two years, and all of a sudden I'm getting a call saying that I'm being court-martialed. I mean that was a huge surprise for me.

Pfc. Willie Brand, 377th Military Police Unit, Bagram, Afghanistan

1 [John Galligan, Willie Brand's attorney] From a defense
perspective, I immediately said *"This is a political show trial."*
5 Willie Brand is a good soldier. Good soldiers tend to obey orders.
Good soldiers tend to be people who do what they are trained
to do.

10 [Tim Golden, New York Times Reporter] The interrogators on
the ground for the most part didn't know what the rules were.
They'd never been interrogators before.

15 [Pfc. Damien Corsetti, 519th Military Intelligence Unit, Bagram,
Afghanistan] My interrogation training consisted basically of, they
taught us some approaches — you know — how to get people
to talk. And then — *"Here, go watch these guys interrogate"* —
which were the people that we were replacing — for about five
or six hours before I did my first interrogation.

20 [William Cassara, Damien Corsetti's attorney] Damien was
picked for this job because he's big, he's loud, and he's scary.
That was his qualification.

25 [Pfc. Damien Corsetti, 519th Military Intelligence Unit, Bagram,
Afghanistan] *"Soldiers are dying. Get the information."* That's
all you're told. *"Get the information."*

30 [Tim Golden, New York Times Reporter] Soldiers said that when
prisoners like Dilawar came into Bagram, they were immediately
assaulted.

SHOCK OF CAPTURE

35 They blasted music at them. Often, they had dogs barking at
them. And they would use some of the most menacing
interrogators to create this sense of threat. One of those was
Damien Corsetti.

40 [Pfc. Damien Corsetti, 519th Military Intelligence Unit, Bagram,
Afghanistan] With the screening, you're trying to instill what's
called *"The Shock of Capture"*, when the person first comes in.
And that's when they are most apt to give you information 'cause
they're just like, *"Oh, crap, what's going on?"*

Moazzam Begg, British subject detained at Bagram and Guantanamo 2002-2005

[Moazzam Begg, British subject detained at Bagram and Guantanamo 2002-2005] It's not just a disorientation procedure, it's actually a terrorizing procedure. It's designed to terrify you into spilling the beans, as it were. Being spat at. Being sworn at. Having the dogs barking around. Cameras flashing in your face.

[Sgt. Thomas Curtis, Military Police, Bagram] Keep in mind, in their culture, that dog's more shocking to them than it is to us. Kind of like a woman telling them what to do. You know, it's a cultural thing. So you get more bang for your buck, you know, with a dog.

[Moazzam Begg, British subject detained at Bagram and Guantanamo 2002-2005] And then to be re-shackled, completely naked, and to do what they call "*The Body Search*," the cavity search, and then to be questioned naked, shivering.

[Pfc. Willie Brand, Military Police, Bagram] After they are read their rules and everything, they are taken to their cell, to where they're going to be put in sleep deprivation for 24 hours. That's standard for everybody.

ISOLATION CELL

Then, from there, MI directs us that they can go to general population, or if they have to stay in isolation. And if they are going to stay in isolation, if they are going to be allowed to sleep. And if they can, then when.

[Narrator] To weaken the defenses of detainees, interrogators ordered Military Police to find ways of keeping the prisoners awake.

[Sgt. Thomas Curtis, Military Police, Bagram] You know, they are in that room not saying anything — "*Oh, well, maybe he knows a little bit more. Let's let him, you know, lose a little bit more sleep.*" Which is the idea of keeping them like this, so you won't sleep. You'll stand. Because as soon as you let your body

1 go, that pressure on your arms or your wrist — you're going
to feel that with those cuffs on.

5 [Pfc. Damien Corsetti, 519th Military Intelligence Unit, Bagram,
Afghanistan] The only time the MPs would ever help us do
anything would be to keep them on a sleep schedule. You
know, they are guaranteed so much sleep. Is that sleep
consistent? Is it uninterrupted? You know, there's 15 minutes
10 here, 15 minutes there. Who knows? That's how it was
proposed to us.

15 [Sgt. Thomas Curtis, Military Police, Bagram] There would be a
board, when you walked into the room, on his wall. You might
see an arrow going up to the ceiling. And there would be maybe
a "1" by it. So that would be an hour up. He's got to stand up for
one hour. And then you may see a "2" with an arrow pointing
down. That means he can sit down for two hours.

20 [Tim Golden, New York Times Reporter] The prisoners were
kept in these big pens downstairs. And their numbers would be
scribbled on the door of the airlock, which was the little
passageway that they were taken out of when they were brought
up to the isolation cells upstairs.

25 [Moazzam Begg, British subject detained at Bagram and
Guantanamo 2002-2005] Detainees were actually chained, with
their hands above their heads, in these airlocks. His number,
"421," was something I could see often, because his back was
towards me in the airlock, and the numbers were written on the
30 backs of the detainees in black marker. And we all had that. As
well as on the front. My number in Bagram was 180. But later it
became "558."

35 [US Chief of Staff, Richard Myers visits Bagram] Thank you. It's
good to be with you. It's good to be here in Bagram.

General Tommy Franks visits Bagram

Secretary Rumsfeld visits Bagram

40 [Sgt. Thomas Curtis, Military Police, Bagram] I'm sure any high-
ranking officer who toured would see the shackles, because they

are going to tour to look. You know, they are curious just like everybody else is. 1

[Pfc. Damien Corsetti, 519th Military Intelligence Unit, Bagram, Afghanistan] There are always officers coming and going through the facility. We kind of joked about it as being The Greatest Show on Earth. Everyone wanted to come and look at the terrorists. Mr. Rumsfeld's office called our office frequently. 5

General McNeil's headquarters were at Bagram 10

Very high commanders would want to be kept up-to-date on a daily basis on certain prisoners there. The Brass knew. They saw them shackled. They saw them hooded. And they said, "Right on! You're doing a great job!" 15

[Narrator] When the Red Cross toured Bagram, the sleep deprivation chart was erased. And the prisoners were unshackled.

[Tim Golden, New York Times Reporter] Traditional military procedure did not allow you to shackle somebody to a fixed object. Certainly not chaining their arms overhead. Initially they were handcuffing people into the airlock of the cells for punishment. And that was to be strictly limited. 15 minutes. Half an hour. But it quickly "evolved". And when you walked in there, they just had a pair of long handcuffs dangling from the wire mesh ceiling of the cell. Ready for whoever came in. 20 25

CAUSE OF DEATH

Manner of Death: Homicide 30

[Narrator] The Army Coroner who examined Dilawar discovered massive tissue damage in his legs. She later testified that his legs had been pulpified. But what could have caused that kind of damage? 35

[Colonel David Hayden] This is not a hotel. This is not a place for them to get fat, lazy and happy.

[Narrator] In a videotape that surfaced as part of the homicide investigation, Colonel David Hayden, the top Army lawyer for 40

1 U.S. Forces in Afghanistan, described a policy of shackling
and striking detainees.

5 [Colonel David Hayden] There was an approved technique for
the MPs when somebody was a difficult prisoner that you could
hit them on the legs. It was supposedly considered not a lethal
blow.

10 [Sgt. Thomas Curtis, Military Police, Bagram] I didn't actually
hear a higher-up say, *"Go and kick them in the leg if they do
this and they do that."* But the higher-ups said, *"In order to get
control of them, that's an option that you can use."*

15 [Pfc. Willie Brand, Military Police, Bagram] It's just your knee
going into the side of their thigh about mid-way up. There's
supposed to be a pressure point right there. And it controls them
really easy.

20 [Colonel David Hayden] Over two days, everybody's hitting you
in the legs, it can cause some severe problems.

25 [Tim Golden, New York Times Reporter] Throughout the
investigation, and even in the trials, a lot of the guards and
interrogators described Dilawar as a very combative detainee,
as a tough character. And that's just never been reconciled with
all the other evidence that there was about this guy. He weighed
122 pounds when he died. The men who had been passengers
in Dilawar's taxi told us later that he had just been absolutely
terrified at Bagram. That they heard him through the walls of the
30 isolation cells screaming for his mother and father.

35 [Moazzam Begg, British subject detained at Bagram and
Guantanamo 2002-2005] He'd been in a very uncomfortable
position muttering some things, sometimes praying, sometimes
asking for help, or seemingly asking for help, because I couldn't
understand his language.

40 [Narrator] A number of witnesses remember the night before
Dilawar died.

[Sgt. Thomas Curtis, Military Police, Bagram] Just that one night
he got kicked in the leg, maybe like 10 times.

[Tim Golden, New York Times Reporter] Some of the soldiers said they started using the knee strikes essentially to shut them up, because he was yelling and screaming.

[Sgt. Anthony Morden, Military Police, Bagram] The damage that was done was done from multiple strikes. And a lot of that could have been avoided had you known the person before you had fought with them, and used that exact technique.

[Moazzam Begg, British subject detained at Bagram and Guantanamo 2002-2005] When they eventually came to take him to an isolation cell, I believe his body had become almost limp. One of the reasons why they began punching him was that they felt he was putting it on. He was in the airlock standing there with a hood over his head. He had his hands tied above his head, and he was moaning.

[Sgt. Anthony Morden, Military Police, Bagram] He started to fight right there in the airlock. And the airlock has a front gate and a back gate. But both sides are concertina wire. Neither of us officers wanted to get into the concertina wire. So we pulled him out of the airlock and put him on the floor, and put him into restraints.

[Narrator] What kind of force did you have to use to subdue him?

[Sgt. Anthony Morden, Military Police, Bagram] Physical force. He was struck.

[Spc. Glendale Walls, Interrogated Dilawar at Bagram] There were like four MPs on this guy. And one of the MPs just kept giving him kidney shots. The other two, they'd slam him to the ground. And then the fourth one like jumped on his back. He got a big gash on his nose.

[Moazzam Begg, British subject detained at Bagram and Guantanamo 2002-2005] There was no reason to hit him. Remember, he was shackled.

1 [Sgt. Thomas Curtis, Military Police, Bagram] Even when
control wasn't an issue, it became *"Well, I'm just going to do
this to get mine in."* And that's probably why they got in
trouble. Because you really couldn't justify kicking the guy
5 that much if he was just chained up.

[Narrator] Dilawar was taken to an isolation cell where the
knee strikes continued. In her statement at trial, the Army
Coroner said his lower limbs looked like they had been run
10 over by a bus. Had he lived, it would have been necessary to
amputate his legs.

15 [Pfc. Willie Brand, Military Police, Bagram] Then it kind of raised
the question of like, *"This is what we did to him."* It's not just
like this is what I did to him, or this is what Cammie did to him,
or Morden or anybody. Just, *"This is what we've done."*

20 [Tim Golden, New York Times Reporter] It's almost hard to
fathom now. You had soldiers like Willie Brand who seems like
this very gentle, kind of soft-spoken guy, but who testified that
he struck Dilawar so many times in the leg that his knee got
tired, and he had to switch to the other one.

25 [Sgt. Anthony Morden, Military Police, Bagram] Sometimes I feel
that I should have gone with my own morality more than what
was common.

30 [Narrator] One MP testified that the strikes became an amusement
inflicted on Dilawar just to hear him scream *"Allah."*

35 [Sgt. Thomas Curtis, Military Police, Bagram] Some would say,
*"Well, hey, you should have stopped this. You should have
stopped that when you saw he was injured, or saw he was being
kicked on this — why didn't you do something?"* That would be
a good question! And my answer would be, *"Well, you know, it
was us against them."* I was over there. I didn't want to appear
to be going against my fellow soldiers. Which — is that wrong?
You could sit here and say that was dead wrong. Go over there
and say that!

40 [Narrator] No one ever investigated who set the rules at Bagram.
Investigators never asked Capt. Wood what senior officers had
given orders to treat detainees in ways that were forbidden

according to the Army Field Manual. MP Capt. Beiring was the only officer prosecuted in the case. 1

Capt. Christopher Beiring, Dereliction of duty, Making a false statement 5

Capt. Christopher Beiring, Charges dropped, No other officers charged

His dereliction of duty charge was dismissed when the judge determined that no one had made clear what Capt. Beiring's duty was. In spite of repeated requests for proper training, rules of engagement for his soldiers, his superiors gave him neither. [Spc. Glendale Walls, 519th Military Intelligence, Interrogated Dilawar at Bagram] We were all worried about not having that written guidelines. But they kept reassuring us that it was coming. [Pfc. Damien Corsetti, Military Intelligence, Bagram] We knew exactly why we weren't getting clear guidance, just in case something like this happened. 10 15 20

[Spc. Glendale Walls, 519th Military Intelligence, Interrogated Dilawar at Bagram] If I had to do it again, I'd probably say "No." I'm not doing anything until I see something in writing.

[Narrator] Do you think that looking back, you think you were misled? 25

[Spc. Glendale Walls, 519th Military Intelligence, Interrogated Dilawar at Bagram] I think we all were. 30

CHANGING THE RULES

[Narrator] A week after September 11th, Vice-President Dick Cheney appeared on Meet the Press to describe how interrogation policies were about to change. 35

PAYBACK

[Vice-President Dick Cheney] They have to work so that the Dark Side, if you will. We've got to spend time in the shadows in the Intelligence World. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources 40

1 and methods that are available to our Intelligence Agencies.
If we're going to be successful! That's the world these folks
operate in. And so it's going to be vital for us to use any means
at our disposal basically to achieve our objective.

5 [Scott Horton, Chair, Committee on International Law, NYC
Bar Association] It's very clear that it starts in the office of
Vice-President Cheney. He had a very strong view that we
were not as aggressive in dealing with people in interrogations
10 as we could or should be.

*Scott Horton, Chair, Committee on International Law, NYC Bar
Association*

15 *"Taking the gloves off."* Being rough with detainees.

[Narrator] If Dick Cheney was the primary architect of a new
policy, John Yoo was the chief draftsman.

20 *John Yoo, Dept. of Justice, Office of Legal Counsel 2001-2003*
He wrote guiding opinions that argued for a flexible approach
to treating suspected terrorists.

25 [John Yoo, Dept. of Justice, Office of Legal Counsel 2001-2003]
The United States used to treat terrorism as a criminal justice
problem. The September 11th attacks showed that the struggle
with Al Qaeda had moved into warfare. And I think when a
foreign entity for political purposes, can kill 3,000 Americans,
and cause billions of dollars of damage, and try to eliminate the
30 leaders of the American government, that sounds like war to
most people. It doesn't sound like crime.

35 [Narrator] President Bush declared a war on terror. But he raised
questions about whether suspected terrorists should be protected
by the laws of war: The Geneva Conventions. Atrocities that
shocked the conscience of the world gave rise to the modern
Geneva Conventions. International treaties meant to provide
fundamental protections for every human being captured in
wartime. In effect for over 50 years, Geneva offered legal
40 protections and prohibited interrogators from using torture,
murder, or even humiliating and degrading treatment. After 9/
11, John Yoo worked closely with Dick Cheney's office and
Alberto Gonzales, counsel to the President. They wrote a series

of memos arguing that the Geneva Conventions did not apply to suspected terrorists. And they gave legal cover for the CIA and Special Forces to embark on a secret program of previously forbidden interrogation techniques.

The procedures adopted to try Hamdan also violate the Geneva Conventions. The D. C. Circuit dismissed Hamdan's challenge in this regard on the grounds, *inter alia*, that the Conventions are not judicially enforceable and that, in any event, Hamdan is not entitled to their protections. Neither of these grounds is persuasive. — *Hamdan v. Rumsfeld*, decided by the United States Supreme Court on June 29, 2006

[“President” George Bush] More than 3,000 suspected terrorists have been arrested in many countries. Many others have met a different fate. Let’s put it this way: They are no longer a problem to the United States and our friends and allies!

[*Mass Clapping!*]

[Narrator] The problem for the President, Gonzales warned, was that some of the new interrogation techniques were banned under U.S. and International law.

[Rear Admiral John Hutson (Ret., Former Judge Advocate General, 30 Years Military experience)] One of the points that he makes is that we don’t want the Geneva Conventions to apply, because if they do, these things can be war crimes.

Rear Admiral John Hutson (Ret.), Former Judge Advocate General, 30 Years Military experience

[Alberto Mora, General Counsel to the Navy, 2001-2006] What’s well known is the principle of command responsibility. This was established in the Nuremberg trials after World War II. And it established the principle of International Criminal Law.

Alberto Mora, General Counsel to the Navy, 2001-2006

1 That individuals who order illegal treatment will be held
accountable for the illegal treatment, even if they're not
immediately applying that kind of abusive treatment.

5 [Narrator] To be certain that Americans interrogating prisoners
would not be accused of torture, John Yoo co-authored a memo
that would clarify the meaning of the term.

10 [Senator Carl Levin, Senate Armed Services Committee] The only
prohibited acts would be extreme acts, which are equivalent to
serious physical injury, such as organ failure, impairment of
bodily functions, or even death. That's an illegal memo. That's
the so-called "*torture memo*."

15 [Alberto Gonzales, Attorney General Confirmation Hearing] That
was an arguable interpretation of the law. I'm sure we had
discussions about it. And ultimately, it was accepted. Because
that was the ultimate decision and position of the Office of Legal
Counsel.

20 [Alberto Mora, General Counsel to the Navy, 2001-2006] The
office of Legal Counsel memorandum was unbounded. Meaning
that nowhere did it state that the application of cruel and
unhuman and degrading treatment was prohibited. And at one
25 point I asked John Yoo, "*Can the President authorize torture?*"
And his response was "Yes."

30 [John Yoo, Dept. of Justice, Office of Legal Counsel 2001-2003]
I think the lawyer's job is to tell people what laws do or do not
apply, so that they know what space they have to make their
policy decision.

35 [Professor Doug Cassel] If the President deems that he's got to
torture somebody, including by crushing the testicles of the
person's child, there's no law that can stop that? That's what
you wrote in the August 2002 memo.

40 [John Yoo, Dept. of Justice, Office of Legal Counsel 2001-2003]
I think it depends on why the President thinks he needs to do
that.

[Narrator] Military lawyers were outraged by the implications of John Yoo's memo. 1

[Scott Horton, Chair, Committee on International Law, NYC Bar Association] My first involvement in this came when I was visited by a group of very senior JAG officers [JAG=Judge Advocate General] more than a year before the first story about Abu Ghraib broke, who were very troubled about what was going on. And the focus of their concern was failing in the responsibilities that the military leadership had to soldiers in the field. That was responsibility to provide fair, clear guidance to them as to how to behave in these difficult circumstances. And what they saw was an intentional decision taken at the height of the Pentagon to put out a fog of ambiguity, coupled with great pressure to bring results. To be prepared to be violent with the detainees. But, you know, this violence with the detainees is a criminal act. 5 10 15

[Senator John McCain] They may be Al Qaeda. They may be Taliban. They may be the worst people in the world, and I'm sure that some of them are. But there are certain basic rules, and international agreements that the United States has agreed to that we will observe. You go ahead and please respond. You wanted to, 20

[Lt. General Randall M. Schmidt, Author of "*Schmidt Report*"] Okay, very quickly, let me clarify. The President's policy: "*As a matter of policy the United States Armed Forces shall continue to treat detainees humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.*" 25 30

[Senator John McCain] That is a legalistic statement and one that is ridden with loopholes. And it is clear to me that the interrogators did not understand that "*humane treatment*" might be in the eye of the beholder. 35

[Narrator] In the field in Afghanistan, there was a great deal of confusion about exactly what the rules were. 40

[Spc. Glendale Walls, 519th Military Intelligence, Interrogated Dilawar at Bagram] They told us when dealing with the PUCs as

1 they called them, the Persons Under U.S. Custody, "*They don't*
fall under Geneva Conventions." Basically, the only thing we
weren't allowed to do is beat 'em up. "*Person Under Control,*"
5 "*Person Under Custody.*" Something like that. You know, they
call them anything to dehumanize them so that you don't look
at them as people.

[PUC = PERSON UNDER U.S. CUSTODY]

10 [Sgt. Thomas Curtis, Military Police, Bagram] I don't remember
hearing anything about Geneva Convention. Of course I'm
familiar with it, but they didn't go over that in any kind of detail.
[Pfc. Damien Corsetti, Military Intelligence, Bagram] I didn't
15 know what the Field Manual for Interrogation, I didn't know the
proper nomenclature for it. I'd seen it. There was a copy lying
around, I'm sure, somewhere. And if I had chosen to, I could
have picked it up and read it. But I was working 16-hour days.
To sit down and read a Field Manual was not top of my priorities
over there.

20 [Vice-President Dick Cheney] It is a mean, nasty, dangerous,
dirty business out there. And we have to operate in that arena.
I'm convinced we can do it. We can do it successfully. But we
need to make certain that we have not tied the hands, if you
25 will, of our Intelligence Communities in terms of accomplishing
their mission.

[Fox News] These terrorists play by a whole different set of rules.
30 It's going to force us — in your words — to get mean, dirty and
nasty in order to take them on?

[Vice-President Dick Cheney] Uh-hmm. Right.

THE LABORATORY

35 [Narrator] Guided by a legal opinion from John Yoo, the Bush
Administration began shipping some high-value detainees to the
U.S. Naval Base in Guantanamo Bay, Cuba.

40 [Rear Admiral John Hutson (Ret.), Former Judge Advocate
General, 30 Years Military Experience] Initially I thought, "*Good,*
safe place! Put them there, barbed wire all over." Then it became
apparent the reason we were doing it was because we were

going to argue that there's no law. You know, Cuban law didn't apply. U.S. law didn't apply. Well, that was a big step down the slippery slope. 1

The Government argues unpersuasively that abstention is appropriate under *Councilman*, which concluded that, as a matter of comity, federal courts should normally abstain from intervening in pending courts-martial against service members, see 420 U. S., at 740. Neither of the comity considerations *Councilman* identified weighs in favor of abstention here. First, the assertion that military discipline and, therefore, the Armed Forces' efficient operation, are best served if the military justice system acts without regular interference from civilian courts, see *id.*, at 752, is inapt because Hamdan is not a service member. Second, the view that federal courts should respect the balance Congress struck when it created "*an integrated system of military courts and review procedures*" is inapposite, since the tribunal convened to try Hamdan is not part of that integrated system. Rather than *Councilman*, the most relevant precedent is *Ex parte Quirin*, where the Court, far from abstaining pending the conclusion of ongoing military proceedings, expedited its review because of (1) the public importance of the questions raised, (2) the Court's duty, in both peace and war, to preserve the constitutional safeguards of civil liberty, and (3) the public interest in a decision on those questions without delay, 317 U. S., at 19. The Government has identified no countervailing interest that would permit federal courts to depart from their general duty to exercise the jurisdiction Congress has conferred on them. — *Hamdan v. Rumsfeld*, decided by the United States Supreme Court on June 29, 2006 5 10 15 20 25 30

[John Yoo, Dept. of Justice, Office of Legal Counsel 2001-2003] I think what the policy makers are trying to do was to try and find a place that was physically close to the United States so it can be well-protected but still would benefit from the rule that the United States Military has ultimate say and control over any prisoners held outside the country. 35

The appeals court relied on a statement in *Johnson v. Eisentrager*, 339 U. S. 763, n. 14, suggesting that this Court lacked power even to consider the merits of a Convention argument because the political and military authorities had sole responsibility for 40

1 observing and enforcing prisoners' rights under the
Convention. However, *Eisentrager* does not control here
because, regardless of the nature of the rights conferred on
Hamdan, cf. *United States v. Rauscher*, 119 U. S. 407, they are
5 indisputably part of the law of war, see *Hamdi*, 542 U. S., at
520–521, compliance with which is the condition upon which
UCMJ Art. 21 authority is granted. — *Hamdan v. Rumsfeld*,
decided by the United States Supreme Court on June 29, 2006

10 [“President” George W. Bush] One by one the terrorists are
learning the meaning of American “Justice.”

STANDING OVATION FROM THE MOB CONGRESS

15 [Narrator] In December, 2001, a man named Mohamed al-
Kahtani [Muhammed al-Qahtani] was swept up in Afghanistan
and sent to Guantanamo. After eight months in detention, the
Army “discovered” that he “may have” trained to be the 20th
hijacker. Suddenly, Kahtani became the most important detainee
20 in Guantanamo.

[Brigadier General Jay Hood, Commander Joint Task Force,
Guantanamo 2004-2006] Here we had a man who was supposed
to have been on that plane that was flown into the Pennsylvania
countryside. So I think there was a sense of urgency to find out
25 what this guy knew in order to be able to prevent any future
attacks.

30 *Brigadier General Jay Hood, Commander Joint Task Force,
Guantanamo 2004-2006*

[Lt. General Randall M. Schmidt, Author of “Schmidt Report”]
He successfully resisted standard interrogation techniques at
Guantanamo for eight months.

35 *Lt. General Randall M. Schmidt, Author of “Schmidt Report”*

And he is the genesis for the request by the Joint Task Force at
Guantanamo for more techniques that might be able to get past
40 his resistance training.

[Narrator] In September 2002, John Yoo and Alberto Gonzales traveled to Guantanamo. Soon after their visit, and just before Dilawar's arrival at Bagram, Donald Rumsfeld personally approved a new menu of psychological interrogation techniques for use on Mohamed al-Kahtani. Exactly how the techniques would be applied was often left to the imagination of the interrogators.

[Lt. General Randall M. Schmidt, Author of "Schmidt Report"] It was California avocado freestyle ... I mean it was just a free for all (about the al-Qahtani interrogation).

Gita Gutierrez, Lawyer for Mohammed al-Qahtani

[Gita Gutierrez, Lawyer for Mohammed al-Qahtani] His interrogations are well documented in a log, and from November, 2002 until early January, 2003, he was subjected to this regime. It involved very severe sleep deprivation. He was only permitted to sleep 4 hours a day from 7:00 in the morning to 11:00 in the morning, and that lasted for 50 days with one exception. He was held in severe isolation and sensory deprivation.

LOG PAGE 23: DETAINEE WAS TOLD TO STAND AND LOUD MUSIC WAS PLAYED TO KEEP DETAINEE AWAKE.

Use of 20 hour investigations

Deprivation of light and auditory stimuli

Inducing stress by use of detainee's fears (e.g., dogs)

There are a number of instances in the log where you will see the phrase "invasion of space by a female." And that was actually an interrogation tactic designed to break his faith.

LOG PAGE 56: FEMALE INTERROGATOR USED INVASION OF PERSONAL SPACE AND DETAINEE CRIED OUT TO ALLAH.

[Lt. General Randall M. Schmidt, Author of "Schmidt Report"] The Interrogator approached Detainee from behind, and rubbed his back, whispered in his ear, and ran fingers through his hair. That was authorized under the utility technique.

YOUR

1 MOTHER
IS
A
WHORE

5 [Gita Gutierrez, Lawyer for Mohammed al-Qahtani] He was subjected to what I would call "sexual assault" by female interrogators.

10 LOG PAGE 51: HE WAS LAID OUT ON THE FLOOR SO I STRADDLED HIM.

15 [Lt. General Randall M. Schmidt, Author of "Schmidt Report"] He was forced to wear women's lingerie. There were multiple allegations of homosexuality, and that his comrades were aware of that. He was forced to dance with a male interrogator. Subject to strip searches for control measures, not for security.

20 LOG PAGE 47: DOG TRICKS CONTINUED

And he was forced to perform dog tricks. All of this to lower his personal sense of worth.

25 LOG PAGE 47: TOLD DETAINEE THAT A DOG IS HELD IN HIGHER ESTEEM THAN HE IS

30 [Gita Gutierrez, Lawyer for Mohammed al-Qahtani] They've tried to characterize it as individual interrogators pushing the envelope, or starting to get (quote) "creative."

LOG PAGE 35: Sissy Slap Glove is inflated and periodically touched to detainee's face

35 LOG PAGE 17: DETAINEE GIVEN AN ENEMA.

LOG PAGE 19: CONTROL BEGAN "BIRTHDAY PARTY" AND PLACED PARTY HAT ON DETAINEE.

40 LOG PAGE 19: INTERROGATORS AND GUARDS SING "GOD BLESS AMERICA."

LOG PAGE 7: DETAINEE GIVEN THREE AND ONE-HALF BAGS IV.

LOG PAGE 7: HE'S WILLING TO TALK SO HE CAN URINATE. 1

LOG PAGE 7: HE WAS TOLD HE WILL NOT BE UNSTRAPPED. 5

LOG PAGE 7: DETAINEE URINATED IN HIS PANTS. 5

LOG PAGE 53: THE INTERROGATORS REMOVED THE
BLANKET AND TURNED AIR CONDITIONER BACK UP 10

[Gita Gutierrez, Lawyer for Mohammed al-Qahtani] The
combination of his lack of food intake and forcible hydration
led him at one point to actually his heart slowed down to 35
beats a minute, and he was rushed to the hospital to be revived.

LOG PAGE 27: DETAINEE'S PULSE UNUSUALLY SLOW — 35
BPM. 15

LOG PAGE 27: TAKE DETAINEE TO HOSPITAL TO PERFORM
CT SCAN OF DETAINEE'S BRAIN. 20

[Professor Alfred McCoy, Author of "A Question of Torture"]
Mohamed al-Kahtani, in many ways, that single interrogation,
protected interrogation, contains within it, if you will, the entire
genealogy, the entire history of CIA torture over the last 50 years.

Professor Alfred McCoy, Author of "A Question of Torture" 25

The CIA launched a mind control project, a veritable Manhattan
Project of the Mind, in the 1950s. In-house, the CIA worked on
exotic techniques. Hypnosis. And then they worked on sodium
pentathol. And then they worked on electro-shock. And 30
ultimately, they discovered LSD. All of that broke stuff, in-house,
went nowhere, except to lawsuits. But what did work, was the
CIA outsourced all the dull, behavioral research to the most
brilliant behavioral scientists at the top universities in the United
States and Canada. 35

[Narrator] At McGill, experiments by famed psychologist Donald
O. Hebb caught the eye of CIA researchers.

McGill University, Quebec 40

1 [Professor Alfred McCoy, Author of "*A Question of Torture*"]
Dr. Hebb found that he could induce a state akin to acute
psychosis in 48 hours. All he did, he had student volunteers sit
in a very pleasant air-conditioned cubicle with goggles, gloves
5 and ear muffs. Actually, you know what they looked just like?
The Guantanamo detainees! If you see those outfits that the
Guantanamo detainees have where they have the gloves and
the goggles and the ear muffs? You know, everybody thinks
that's security. No, no, no. That's sensory breakdown. Within
10 a day there would be hallucinations. Within two days,
breakdown.

[Dr. Donald O. Hebb, McGill University, Quebec] I began to
think while we were doing our experiments that it is possible
15 that something that involves physical discomfort or even pain
might be more tolerable than simply the deprivation conditions
that we studied.

[Professor Alfred McCoy, Author of "*A Question of Torture*"]
20 The CIA was fascinated by this. They jumped on it immediately.

[Dr. Donald O. Hebb, McGill University, Quebec] I had no idea
what a potentially vicious weapon this could be.

25 [Professor Alfred McCoy, Author of "*A Question of Torture*"]
They identify two key techniques: They identified sensory
disorientation, and they identified self-inflicted pain: standing.
For days at a time while fluids flowed to the legs. And they put
them together in the Kubark Counterintelligence Interrogation
30 Manual. And they propagated it around the world and through
the U.S. Intelligence community. Think about what al-Kahtani
was subjected to, okay? First of all, he's in dark; he's in light.

35 He's in cold; he's in heat. What they are doing is they are
attacking his universal sensory receptors. They are also
scrambling his time. So that's Phase One. In Guantanamo under
the regime of General Miller, he turned Guantanamo into a
veritable behavioral scientific laboratory. And Donald Rumsfeld
40 gave orders for techniques beyond the Field Manual. And they
percolated. And they percolated in an ambiguous way that
allowed people to kind of do what they thought needed to be
done. And they explore Arab male sensitivity to gender and

sexual identity. So that's the thing about being homosexual. 1
The underwear on the head. All that sort of stuff.

[Spc. Tony Lagouranis, Interrogator, Iraq] People were saying, 5
"Arabs really are very sensitive to sexual humiliation." Well, who the hell isn't sensitive to sexual humiliation? You know, nobody wants to be stripped down naked and forced to masturbate with a hood over your head. It's ridiculous!

[Professor Alfred McCoy, Author of "A Question of Torture"] 10
Then they created behavioral science consultation teams where they had military psychologists integrate into the ongoing interrogation to discover individual fears and phobias. And all of that was visited on al-Kahtani.

[Senator John McCain] You are aware of communications 15
between General Miller and Secretary Rumsfeld specifically about this one prisoner?

[Lt. General Randall M. Schmidt, Author of "Schmidt Report"] 20
To our knowledge there was a considerable amount of communication up and down the chain.

[Professor Alfred McCoy, Author of "A Question of Torture"] As 25
you know, from General Schmidt's report, he concluded that these techniques individually did not constitute torture. But he said that the sum of these techniques ...

[Lt. General Randall M. Schmidt, Author of "Schmidt Report"] 30
The cumulative effect of simultaneous applications of numerous, authorized techniques had abusive and degrading impact on the detainee.

U.S. ARMY DECLINED TO DISCIPLINE GEN. MILLER

[Narrator] And he recommended that General Miller be 35
disciplined.

[Professor Alfred McCoy, Author of "A Question of Torture"] 40
But he said it did not constitute torture.

1 [Lt. General Randall M. Schmidt, Author of "*Schmidt Report*"]
We made a distinction between what torture and inhumane
treatment would be, given the general guidelines, and then what
might be abusive and degrading. Something might be degrading,
5 but not necessarily torture. And it may not be inhumane. It may
be humiliating, but it may not be torture. No torture, no physical
pain injury. There was a safe, secure environment the entire
time.

10 [Professor Alfred McCoy, Author of "*A Question of Torture*"]
And that, of course, is the genius of the CIA's psychological
paradigm. Psychological torture is all a matter of definitions.
And it's very slippery indeed.

15 [Senator] That sounds remarkably similar to what occurred at
Abu Ghraib. People being led around in chains. People being
forced to wear lingerie. Perhaps a coincidence, perhaps not.

20 [Professor Alfred McCoy, Author of "*A Question of Torture*"] If
you look at those Abu Ghraib photographs, again, it's always
the same techniques. First of all, there's the sexual activity with
the woman's garments. And the masturbation and all the rest.
That's the cultural sensitivity. They are short-shackled; they are
long-shackled; they are shackled upside-down. These are stress
25 positions. The most famous of all Abu Ghraib photographs, of
course, of that hooded Iraqi standing on a box, arms outstretched.
He's told if he steps off the box, if he moves, he'll be electrocuted.
That's the point of the fake electrical wires. So it's the absolute
immobility for protracted periods. And then with arms extended.
30 As we would say to the viewers, "*Don't try this at home.*" But
do try it! Just stand for ten minutes with your arms stretched out,
not moving.

35 [Narrator] Carolyn Wood was an example of the way new
techniques spread and mutated like a virus. Long before Wood
took charge of interrogation at Abu Ghraib, her unit was involved
with harsh techniques at Bagram, including stress positions,
forced standing, and sleep deprivation.

40 [Tim Golden, New York Times Journalist] One of the memoranda
shows that in early December, 2002, the interrogators at Bagram
just looked on the Internet—they are in touch with the guys at

Guantanamo — and they learned that these guys at Guantanamo had gotten new techniques from the Secretary of Defense, and they just started using them. Even though the techniques had clearly been approved exclusively for use at Guantanamo. 1
5

[Professor Alfred McCoy, Author of *"A Question of Torture"*] When General Miller himself traveled from Guantanamo to Iraq in August, 2003, he brought with him a CD and a manual on the "advanced" techniques they had developed at Guantanamo. And he gave them to General Sanchez's command. So there are these multiple paths that you can trace whereby these interrogators' techniques go through this global migration, through Afghanistan, to Iraq, from Guantanamo directly to Iraq. And the net result is Abu Ghraib. 10
15

[Narrator] Well before the abuses at Abu Ghraib became public, government officials had been quietly raising concerns about harsh techniques in use at Guantanamo. 20

[Senator Carl Levin, Senate Armed Services Committee] There were emails back to the Department of Justice from FBI personnel down at Guantanamo saying, "You won't believe what's going on down here. We've got to disassociate ourselves as FBI people from what is going on here in Guantanamo." This email says "The DOD has their marching orders from the Secretary of Defense" — "Marching orders from the Secretary of Defense!" — to engage in practices which the FBI finds to be deeply offensive and dangerous." But the emails are what is called "redacted", which means that there's big holes in these emails. 25
30
Now some of these emails are totally redacted, so we don't know what they say at all. That's an example of a lot of the documents that we got here. You know, you can't see anything on these documents. There's one after another where there's nothing. 35

THE INSIDER

[Alberto Mora, General Counsel to the Navy, 2001-2006] In early December, 2002, I had heard that there was detainee abuse going on. I called the Army General Counsel and asked him whether he had any information. I said, "I'm receiving reports that some of the detainees are being abused at Guantanamo. 40

1 Do you know anything about this?" And his response back
was, "I know a lot about it. Come on down to my office."
They pushed a stack of documents across the desk. The top
document was Memorandum from the General Counsel,
5 Department of Defense to Secretary Rumsfeld. And it was that
cover memo that requested authorization of the application
of certain interrogation techniques. And the top memo gave
Secretary Rumsfeld's approval for the application of some of
those techniques. It's the memo with Secretary Rumsfeld's
10 handwritten notations on the bottom saying that he stands 8-
10 hours a day — "*How come these detainees are only required
to stand up to four hours a day?*" I was astounded! But my
first reaction was that this was a mistake! Somebody just didn't
read the documents carefully enough.

15 [Tim Golden, New York Times Journalist] I think people in the
Pentagon thought of Alberto Mora as a loyal, Republican,
political appointee. He would never have been considered a
rabble-rouser or a liberal. He said he expected that he would
20 raise these issues, and people in positions of authority would
say, "*Oh! Thanks for letting us know.*" And that would be the
end of it.

25 [Reporter] I want to ask you about a memo that was written by
Alberto Mora. Do you recall on this memo that you wrote a
little notation on the bottom about standing more than four hours,
because you stand at your desk ...

30 [Secretary of Defense Donald Rumsfeld] [Cuts him off] I do! I
do!

35 [Reporter] This attorney argued that that could be interpreted by
some as a wink-and-a-nod that it would be okay to go beyond
the techniques that were prescribed in the memo.

40 [Secretary of Defense Donald Rumsfeld] Oh, no, no, no, no, no.
There's no wink-and-a-nod about anything. There was one
provision in there that they would have people stand for several
hours, and it was a semi-humorous remark that a person in his
seventies stands all day long. I just mused that in — and maybe
it shouldn't have gone out, but it did — and I wrote it. And life
goes on.

[Reporter] But his point was that you should have gotten much better advice from your legal staff — 1

[Secretary of Defense Donald Rumsfeld] [Interrupts Reporter again] I heard your question the first time! 5

[Alberto Mora, General Counsel to the Navy, 2001-2006] What was of concern to me was the techniques, how their individual and in combination could rise to the level of torture. Okay, you're permitting certain interrogation techniques. But certainly there must be some limit which is set on the severity of the techniques. Light deprivation could mean placing the detainee in a dark room for 15 minutes, or it could mean a month. Or two months. Or three months until he goes blind. "*Detainee's specific phobia techniques*": the snakes, the bats, the rats, lock somebody up in a coffin — you're limited only by your imagination. Any one of these techniques individually could yield the results of torture. Certainly, in combination, you could reach that fairly quickly. 10 15

[Dr. Donald O. Hebb] See, if you put a person into this procedure, and keep them there for more than the six or eight days that I would think might be the maximum tolerability, then the price is pretty high. 20

[Narrator] The price is someone's sanity? 25

[Dr. Donald O. Hebb] Presumably, it could be.

[Alberto Mora, General Counsel to the Navy, 2001-2006] The medical literature had a phenomenon called "*force drift*," that made it almost inevitable that the interrogators would continue applying greater and greater increments of force to achieve their desired results. 30

[Col. Lawrence Wilkerson, former Chief of Staff to Colin Powell] For example, take Secretary Rumsfeld's memo. And to say that, "*Well, look, he said that dogs have to be muzzled.*" Well, that's a man who doesn't understand the Military on the ground. Because when that E-6 is sitting there with that muzzled dog, and there is absolutely no impact on that person being interrogated, he's going to take that muzzle off. That's reality. That's human nature. 35 40

1 [Narrator] Alberto Mora threatened to go on record with his concerns unless the techniques were rescinded.

5 [Secretary of Defense Donald Rumsfeld] When, after the facts, it turns out that there is concern about it that concerns me, then I'm happy to rescind it and take another fresh look at it. And talk to more people about it. And see what ought to be done.

10 [Alberto Mora, General Counsel to the Navy, 2001-2006] To his credit, Secretary Rumsfeld did rescind the interrogation techniques. And then, for over a year and a half, I heard no reports from any quarter about detainee abuse anywhere. When Abu Ghraib hit, my first thought was, *"Had I been circumvented? Had their been authorizations for the abuse of prisoners that I had not learned about?"*

15 [Narrator] Had the orders really been rescinded? According to interrogators, the use of shackling, dogs, stress positions and sensory assault, continued to be widespread. Tony Lagouranis was an interrogator who arrived in Iraq after the Military became aware of the abuses at Abu Ghraib.

20 [Spc. Tony Lagouranis, Interrogator, Iraq] Among the Interrogation Guidelines they gave us, it said that dogs are authorized to be used on detainees. You know, stress positions. Sleep deprivation. All of those things that I did, or I would consider harsh techniques, or violating Geneva Conventions, I was told to do. So we were told to do that to these people by
25 our Superiors.

30 [Rear Admiral John Hutson (Ret., Former Judge Advocate General, 30 Years Military experience)] The spine of the United States Armed Forces is the chain of command. What starts at the top of the chain of command drops like a rock down the chain
35 of command. And that's why Lynndie England knew what Donald Rumsfeld was thinking without actually talking to Donald Rumsfeld.

40 [Narrator] In the wake of Abu Ghraib, journalists began to look harder at previous cases of abuse ...

*ANNALS OF THE PENTAGON — THE MEMO — HOW AN
INTERNAL EFFORT TO BAN THE ABUSE AND TORTURE OF
DETAINEES WAS THWARTED, BY JANE MAYER* 1

to try to understand what had caused them and who was
responsible. 5

[Col. Lawrence Wilkerson, former Chief of Staff to Colin
Powell] People like Tim Golden at the New York Times got a
hold of it and started looking at the case of Dilawar, in 10
particular. The taxi driver. It became at least plausible to me
that this man wasn't even guilty of anything other than being
there when the sweep occurred. And here was a guy who was
murdered in detention. 15

THE WRONG MAN 15

[Speaker] In memory for those whose lives were taken, for those
who gave selflessly of themselves. Four years ago our nation
came under attack ... 20

[Tim Golden, New York Times Reporter] 9/11 was very much in
the air. And I think the officers tried to keep it in the air. They
tried to remind these kids that these people are our enemies.
But it's hard to see how these young soldiers could have been 25
expected to figure out who their real enemies were among a
bunch of militiamen and farmers in a society that was completely
foreign to them.

[Spc. Glendale Walls, Interrogated Dilawar at Bagram] If I 30
remember correctly, his story had something to do with the rocket
attack at a military base. And he was supposed to be the driver
of the get-away car.

[Tim Golden, New York Times Reporter] He had taken his new 35
car, which he was obviously excited about, and driven to Khost,
the provincial capitol, where he went to look for taxi passengers.
Yakubi! Yakubi!

And he in fact found these three men in Khost, at the marketplace, 40
who were headed back to Yakubi. You have to imagine that
Dilawar was driving home from this provincial capitol, which

1 was about as far as his world stretched. He gets stopped at
Fire Base Salerno by a group of Afghan militiamen. And the
men apparently found an electric stabilizer in the trunk of the
car. At least they claimed to. Camp Salerno had been rocketed
5 from some distance earlier in the day.

Fire Base Salerno, Afghanistan

10 And the Afghan militiamen immediately arrested the four
guys on suspicion of having had some involvement in that
attack. He's taken to Bagram this great distance away. You
get a bunch of guys who are back at this detention site, and
they are told that we have evidence that they have been
involved in a rocket attack on American forces. So I think that
15 kind of tripped a wire in them.

[Tony Lagouranis, Military Interrogator, Iraq] You're in this
atmosphere where you're with nothing but military people. And
you feel sort of morally isolated. And you lose your moral
20 bearings. Then you're frustrated because you're not getting
intelligence from a prisoner that you believe is guilty and has
intelligence to give you. So, of course, you want to start pushing
the limits, and see how far you can go.

25 *Tony Lagouranis, Military Interrogator, Iraq*

[Spc. Glendale Walls, Interrogated Dilawar at Bagram] A lot of
the pressure came from the fact that we had a few high value
detainees that gave a lot of good information. And when we
30 started to lose those detainees due to going to Guantanamo Bay,
that they expected this to come from everybody.

[Pfc. Damien Corsetti, 519th Military Intelligence Unit, Bagram]
We would interrogate some of these guys just to interrogate them.
35 And it was ridiculous. I mean, you'd get some of these guys in
and you're like, *"This is the wrong man. This is not who we're
supposed to have."* Especially being a screener, you could tell
from the moment you got him in. You're like, *"We're not
supposed to have him."*
40

[Spc. Glendale Walls, Interrogated Dilawar at Bagram] We had
one prisoner came in who was mentally challenged. And Sgt.

Loring kept saying that, you know, this is a cover. This is al Qaeda's cover. This is what they do. And I went in there and talked to him and, basically, they had this guy in a diaper. He'd eat his own feces. But Loring kept saying it was an act.

[Pfc. Damien Corsetti, 519th Military Intelligence Unit, Bagram] They'd be like, *"Hey, we want you to go yell at this guy."* So I'd grab my box of Frosted Flakes that I was eating for breakfast that morning, and I'd go into the room, and I'd be like, *"Alright, I have to yell at you today."* So I'd be like *"dehydrogenated salt substitute."* And just start yelling that at them. And they'd be like, they'd look at me all crazy, and I'd be like, *"Yeah! That's your fault they put that in my cereal now."* Or I'd yell at them if Elvis was really the King of Rock, or if he was dead. Or stuff like that. And I'd write that in my interrogation summaries. And I'd send that up to higher that that's what I did for that two hours.

[Spc. Glendale Walls, Interrogated Dilawar at Bagram] You really can't get a feel for a person until after you talk to him a couple of times. So on the first three times I talked to him, it was just verifying his story. Looking for loops. Looking for holes. After the third time I talked to him, and his story was still consistent, I kept telling him I thought he was innocent.

[Tim Golden, New York Times Reporter] And they wanted these people to be guilty because that would look better for their unit. They could say that we arrested 60 people this month. And they were all terrorists.

[Moazzam Begg, Detained at Bagram and Guantanamo] *"When was the last time you saw Osama bin Laden?" "When was the last time you saw Mohamed Atta?"* Now, this was a standard question that they would ask of every detainee.

[Tony Lagouranis, Military Interrogator, Iraq] It's very hard to go into an interrogation with very little evidence — and we almost never had evidence on these guys — and elicit a confession. You can go in and get intelligence, but if you're asking this guy to completely incriminate himself, it's very difficult. So you have to start using harsher and harsher techniques in order to elicit the confession.

1 *Sgt. Steven Loring, 519th Military Intelligence Unit, Bagram,*
Afghanistan

5 [Spc. Glendale Walls, Interrogated Dilawar at Bagram] I was
yelled at for being too nice to him by Sgt. Loring. That I needed
to put more pressure on him. As he liked to say, *"I needed to*
take him out of his comfort zone."

10 [Tim Golden, New York Times Reporter] After a while,
particularly in the fourth and fifth interrogations, as the sleep
deprivation that he was being subjected to really started to knock
him out, the interrogations got more intense. Sgt. Salcedo, who
was an inexperienced interrogator but a kind of can-do
soldier ...

15 *Sgt. Selena Salcedo, 519th Military Intelligence Unit, Bagram,*
Afghanistan

20 had this man who refused to look at her because she was a
woman. She said she got very frustrated by this, and grabbed
him by the sides of the face, and sort of turned him to face her
and look at her, and take her seriously. But, of course, he was
an Afghan man from a tribal, conservative culture, who didn't
look at strange women.

25 [Spc. Glendale Walls, Interrogated Dilawar at Bagram] Sgt.
Salcedo was getting a little aggravated. So I kind of stepped in
between them. And that's when I grabbed him by the shirt. And
I brought him over to the wall.

30 [Tim Golden, New York Times Reporter] They tried to make
him stand up against the wall, and he was sliding down. They
pushed him back against the wall.

35 [Spc. Glendale Walls, Interrogated Dilawar at Bagram] He wasn't
making any kind of sense. Most of it seemed to just be rambling.
The interpreter was telling me that his wife came to visit him in
his cell. Which, of course, didn't happen.

40 [Pfc. Damien Corsetti, Military Intelligence, Bagram] If you've
ever seen anybody sleep-depped, ugh, past two days they begin
to just be bumbling idiots. Three days they are just worthless.

[Spc. Glendale Walls, Interrogated Dilawar at Bagram] I knew something was wrong. And the next thing I heard was that he died. 1

[Tim Golden, New York Times Reporter] Not long after Dilawar was killed, we learned that the Afghan guerilla commander, whose men had arrested Dilawar and the others, had in fact been detained by the Americans himself. And it turned out that he was rocketing their base, and then picking up innocent Afghans and turning them over to the Americans. Essentially to try and ingratiate himself with U.S. forces. The three passengers were sent to Guantanamo. And they didn't get out until March of 2004, which was 15 months after they had been captured riding in the taxi. It's hard to understand what reason the Americans would have had to send these guys on when they had quite clearly concluded that Dilawar, at least, was an innocent man when he was killed. It certainly makes you wonder about whether they just sent these guys on to cover their butts. 5 10 15 20

THE WORST OF THE WORST

[Donald Rumsfeld, Secretary of Defense] "These" are not mere innocents. "These" are among the worst of the worst. "These" are among the most dangerous, best-trained, vicious killers on the face of the earth. 25

[Dick Cheney, Vice-President] "They" are terrorists. "They" are bombmakers. "They" are facilitators of terror. "They" are members of al Qaeda, the Taliban. 30

[Ari Fleischer, Bush White House Press Secretary] And if "they" were free, they would engage in murder once again.

["President" George W. Bush] The only thing I know for certain is that "these" are bad people. 35

Even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him 40

1 to criminal punishment — *Hamdan v. Rumsfeld*, decided by
the United States Supreme Court on June 29, 2006

5 [Tom Wilner, Lawyer For 11 Kuwaitis in Guantanamo] Despite
Rumsfeld's and Cheney's and President Bush's allegations that
"these guys" are the worst of the worst, that they were all captured
on the battlefield, recent studies of the whole compendium of
10 Government's documents show that only five percent of these
people were picked up by the United States. Only 8% of them
are accused of being members of the al Qaeda. Over 90% of
them were picked up by Northern Alliance or Pakistani forces
in exchange for bounties.

15 [Donald Rumsfeld, Secretary of Defense] We have LARGE
rewards out. We have leaflets that are dropping like snowflakes
in December in Chicago.

20 [Narrator] An analysis of declassified government documents
revealed that only 7% of Guantanamo detainees were captured
by U.S. and Coalition forces.

7% CAPTURED BY COALITION FORCES

93% TURNED OVER TO U.S. FORCES

25 The other 93%, like Dilawar and his passengers, were turned
over by Afghan warlords and Pakistanis. Sometimes for cash
payments of thousands of dollars.

30 [John Yoo, Office of Legal Counsel 2001-2003] You know, the
Military is not interested in spending whatever it is — \$40,000 a
year — detaining people who are not members of al Qaeda in
Guantanamo Bay. It has as much interest as everyone else does
in making sure that people who are detained are actually
35 members of al Qaeda, rather than wasting resources and time
detaining innocent people.

40 [Tom Wilner, Lawyer For 11 Kuwaitis in Guantanamo] I think
it's natural in times of war to pick up people. You want to pick
up anyone you suspect of being dangerous. What's different
here is that the Government, for the first time in our history didn't
follow its own regulations, which require that a hearing be held,
promptly after capture, if there is any doubt.

[Major Dan Mori, Military Defense Law for Guantanamo detainee David Hicks] In the war in Afghanistan, back in 2001, the U.S. Military was prepared to follow the Geneva Conventions and conduct those tribunals.

Major Dan Mori, Military Defense Law for Guantanamo detainee David Hicks

Unfortunately, the civilian leadership within the Department of Defense, told them to stop. Once somebody in Afghanistan might have said, "Okay, this person's a high-value target," for whatever reason. Whether it was based on some other Afghani who hated that person and wanted him out so he could take over his opium crop. Then that began the road to GTMO. And there was no way for that person to challenge it. And there still hasn't been.

[Narrator] Moazzam Begg, a British subject suspected of ties to al Qaeda operatives, was picked up by local intelligence agents in Pakistan.

[Moazzam Begg, Detained at Bagram and Guantanamo] I was in my house in Islamabad at the time that I was abducted. A hood was placed over my head. My hands and legs were shackled. And I was physically carried into the back of the vehicle. I didn't see my family again after that point. I was sent to Kandahar, and then to Bagram. And when I was put onto the transport plane to Guantanamo. I'd already been covered from almost head to toe in some sort of a covering: Face mask, ear muffs, blackened goggles. And then, just in case I could see anything, a hood to cover it with. Being seated in the aircraft was excruciatingly painful. They'd already used now the three-piece suit, and that is the shackle that goes around the waist and is padlocked to the back. It was impossible to move. Impossible to breathe properly. Impossible to hear anything. And so I managed to scream and plead with one of the guards to get me a needle to put me to sleep.

[Clive Stafford Smith, Lawyer for Guantanamo detainees, including Moazzam Begg] We fought for 2-1/2 years for just the right to go see the prisoners, and then fought for months more to get security clearance so the Military would let you in there.

1 I mean, this is bizarre! It never occurred to me that when I
went to law school in America, that we'd be sitting around
talking about whether we could have access to our clients.
And whether our clients had been tortured!

5 *habeas corpus*

[Tom Wilner, Lawyer For 11 Kuwaitis in Guantanamo] Habeas
corpus is really the essence of the rule of law. Not giving people
10 a basic hearing when you take away their liberty is one of the
reasons we fought the revolution. That the King can't deprive
somebody of liberty without a hearing!

15 4. The military commission at issue lacks the power to proceed
because its structure and procedures violate both the UCMJ and
the four Geneva Conventions signed in 1949. Pp. 49-72.

(a) The commission's procedures, set forth in Commission
Order No. 1, provide, among other things, that an accused
20 and his civilian counsel may be excluded from, and
precluded from ever learning what evidence was presented
during, any part of the proceeding the official who
appointed the commission or the presiding officer decides
to "close." Grounds for closure include the protection of
25 classified information, the physical safety of participants
and witnesses, the protection of intelligence and law
enforcement sources, methods, or activities, and "other
national security interests." Appointed military defense
counsel must be privy to these closed sessions, but may,
30 at the presiding officer's discretion, be forbidden to reveal
to the client what took place therein. Another striking
feature is that the rules governing Hamdan's commission
permit the admission of any evidence that, in the presiding
officer's opinion, would have probative value to a
35 reasonable person. Moreover, the accused and his civilian
counsel may be denied access to classified and other
"protected information," so long as the presiding officer
concludes that the evidence is "probative" and that its
admission without the accused's knowledge would not
40 result in the denial of a full and fair trial. Pp. 49-52.

- (b) The Government objects to this Court's consideration of a procedural challenge at this stage on the grounds, *inter alia*, that Hamdan will be able to raise such a challenge following a final decision under the DTA, and that there is no basis to presume, before the trial has even commenced, that it will not be conducted in good faith and according to law. These contentions are unsound. First, because Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a prison sentence shorter than 10 years, he has no automatic right to federal-court review of the commission's "*final decision*" under DTA §1005(e)(3). Second, there is a basis to presume that the procedures employed during Hamdan's trial will violate the law: He will be, and *indeed already has been*, excluded from his own trial. Thus, review of the procedures in advance of a "*final decision*" is appropriate. Pp. 52-53. 1 5 10 15
- (c) Because UCMJ Article 36 has not been complied with here, the rules specified for Hamdan's commission trial are illegal. The procedures governing such trials historically have been the same as those governing courts-martial. Although this uniformity principle is not inflexible and does not preclude all departures from courts-martial procedures, any such departure must be tailored to the exigency that necessitates it. That understanding is reflected in Art. 36(b), which provides that the procedural rules the President promulgates for courts-martial and military commissions alike must be "*uniform insofar as practicable*," 10 U. S. C. §836(b). The "*practicability*" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. The President here has determined, pursuant to the requirement of Art. 36(a), that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts" to Hamdan's commission. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial. And even if subsection (b)'s requirements could be satisfied without an official practicability determination, that subsection's requirements are not satisfied here. Nothing in the record demonstrates 20 25 30 35 40

1 that it would be impracticable to apply court-martial
rules here. There is no suggestion, e.g., of any logistical
difficulty in securing properly sworn and authenticated
5 evidence or in applying the usual principles of relevance
and admissibility. It is not evident why the danger posed
by international terrorism, considerable though it is,
should require, in the case of Hamdan's trial, any
variance from the courts-martial rules. The absence of
10 any showing of impracticability is particularly
disturbing when considered in light of the clear and
admitted failure to apply one of the most fundamental
protections afforded not just by the Manual for Courts-
Martial but also by the UCMJ itself: The right to be
15 present. See 10 U. S. C. A. §839(c). Because the jettisoning
of so basic a right cannot lightly be excused as
"practicable," the courts-martial rules must apply. Since
it is undisputed that Commission Order No. 1 deviates in
many significant respects from those rules, it necessarily
20 violates Art. 36(b). Pp. 53-62. — Hamdan v. Rumsfeld,
decided by the United States Supreme Court on June 29,
2006

Guantanamo Bay, Cuba

25 [Narrator] In 2004, 2-1/2 years after the first detainees had arrived
in Guantanamo, the Supreme Court rejected the Bush
Administration's claims that it could hold detainees indefinitely
without allowing them to challenge their detention in the courts.
30 After the decision, the Military installed special new tribunals to
judge whether detainees should remain in Guantanamo.

[Tom Wilner, Lawyer For 11 Kuwaitis in Guantanamo] The
Combatant Status Review Tribunals, which the Government
hurriedly put in place nine days after we won before the Supreme
35 Court, are a joke!

Combatant Status Review Tribunal Hearing Room

40 [Clive Stafford Smith, Lawyer for Guantanamo detainees,
including Moazzam Begg] You have no rights! You have no right
to a lawyer. You have no meaningful right to witnesses. You

don't really know what the charges are and you certainly don't know what the secret evidence is against you. 1

[Rear Adm. James McGarrath, Office of Administrative Review for Detained Enemy Combatants] They may not ever know! But that doesn't eliminate the opportunity they have to make a case for why, if they were returned in the future, why they would not continue to pose a threat. 5

The Government has not charged Hamdan with an "offense ... that by the law of war may be tried by military commission," 10 U. S. C. §821. Of the three sorts of military commissions used historically, the law-of-war type used in *Quirin* and other cases is the only model available to try Hamdan. Among the preconditions, incorporated in Article of War 15 and, later, UCMJ Art. 21, for such a tribunal's exercise of jurisdiction are, *inter alia*, that it must be limited to trying offenses committed within the convening commander's field of command, *i.e.*, within the theater of war, and that the offense charged must have been committed during, not before or after, the war. Here, Hamdan is not alleged to have committed any overt act in a theater of war or on any specified date after September 11, 2001. More importantly, the offense alleged is not triable by law-of-war military commission. Although the common law of war may render triable by military commission certain offenses not defined by statute, *Quirin*, 317 U. S., at 30, the precedent for doing so with respect to a particular offense must be plain and unambiguous, *cf.*, *e.g.*, *Loving v. United States*, 517 U. S. 748. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war. Moreover, that conspiracy is not a recognized violation of the law of war is confirmed by other international sources, including, *e.g.*, the International Military Tribunal at Nuremberg, which pointedly refused to recognize conspiracy to commit war crimes as such a violation. Because the conspiracy charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan. — *Hamdan v. Rumsfeld*, decided by the United States Supreme Court on June 29, 2006 15 20 25 30 35 40

1 [Clive Stafford Smith, Lawyer for Guantanamo detainees,
including Moazzam Begg] Many of my clients are found not
guilty at the CSRT Tribunals. And then the Military thinks that
5 doesn't sound so good. They were being called "*Not Enemy
Combatants, NEC, but now they are NLEC, which means "No
Longer Enemy Combatants,"*" because we want to say they were
guilty to begin with, but now they've had a change of heart so
they're not guilty anymore. But we were right in the first place.
10 [Brigadier General Jay Hood, Commander Joint Task Force,
Guantanamo 2004-2006] These men aren't necessarily innocent
men. That's not an accurate characterization. You're more
accurate in their long title: "*No longer identified as an enemy
combatant.*" They are being held separate from the remainder
15 of the detainees until the United States Government can find
a country they can be returned to.

[Military PR guy] Some of these guys were policed off the battle
field. And if they weren't here, they'd probably be on the
20 battlefield killing American soldiers. They are here for a reason.
And it's our job to insure that they stay here until such time as
it's "deemed" that they don't need to be here any longer.

[Clive Stafford Smith, Lawyer for Guantanamo detainees,
including Moazzam Begg] Guantanamo is hiding the fact that
25 the really bad dudes — Aiman Al, and of course Osama bin
Laden — have never been captured. So you have Guantanamo
Bay as, "*Here are 750 really evil guys*" as a PR stunt, effectively.
To say, "*Look, we're really achieving something in the war on
30 terror.*"

"IN PARTNERSHIP FOR EXCELLENCE"

35 *THE GTMO PRESS TOUR*

[PR Guy] And that is the main entrance to Camp X-Ray. It would
be extremely difficult for anybody to make an escape out of
here. Each one is 8 x 8 x 8.

40 *CAMP X-RAY ABANDONED APRIL 2002*

One individual per cell. If you remember the individuals in the orange jumpsuits, there's like three or four kneeling facing that way, and three or four kneeling facing that way. If you take a shot from right here, you'll have the same image. And no detainee has ever died at GTMO from anything.

**SINCE THIS INTERVIEW, FOUR GUANTANAMO DETAINEES HAVE COMMITTED SUICIDE*

And I think the doctors gave you an update: We've performed well over 100 surgeries. So one good thing for them being here is they are quite healthy, and getting anything fixed they need getting fixed.

[PR Girl] We've introduced some new sports-type activities here in Camp 4. We've recently built this half-basketball court. And off to the left of that, you will see a soccer court. It is a privilege to live in Camp 4. They are compliant with the camp rules in order to live here. And we have introduced things like cake on Wednesday nights. Pepsi on Monday nights. Ice cream on Sunday nights. Let's go in and take a look at the Bed.

[Clive Stafford Smith, Lawyer for Guantanamo detainees, including Moazzam Begg] On the bed, they have the so-called "CI's", or "comfort items," like a toothbrush! But also included is a game of Checkers. And I did ask them, "Who is my partner to play Checkers with?" He's in solitary confinement by himself.

NO PHOTOGRAPHY

[Narrator] What's the problem with the press photographing them? Talking with them? Observing them?

WARNING. RESTRICTED AREA. KEEP OUT. AUTHORIZED PERSONNEL ONLY. NO PHOTOS.

[Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo 2004-2006] The desire to not provide a platform to have the men we're holding espouse vile, Islamic rhetoric. A violent, vile, Islamic rhetoric!

1 *GUANTANAMO BAY GIFT SHOP (Displaying violent vile
Illuminati rhetoric, including Skull & Bones, Dragon, & Maltese
Cross)*

5 *SKULL & BONES, DINOSAUR*

MALTESE CROSS

AMERICA'S FINEST

10 *CUBAN ROCK IGUANA*

BEHAVIOR MODIFICATION INSTRUCTOR

15 [PR Guy] This is a tactic of al Qaeda: hunger strike to elicit
media attention, and to bring pressure on the United States
Government. When these numbers go up significantly, you
guys start talking about it. You guys start asking about it.

20 ** 81 DETAINEES WERE ON HUNGER STRIKE DURING OUR
TOUR*

So they understand that.

25 [PR Guy] Camp 5 is a 100-bed, maximum security segregation
interrogation facility.

[Clive Stafford Smith, Lawyer for Guantanamo detainees,
including Moazzam Begg] If they're held in Camp 5, an average
30 day is always the same. Which is you're held 24 hours in solitary
confinement.

[Moazzam Begg, 20 months in isolation, Guantanamo] Here in
the cell, it was 8' x 6', and I couldn't physically take 3 steps in
35 any direction. I certainly believed that I was going to spend the
greater part of my life, and perhaps even face execution, which
was what I was told quite often.

[Clive Stafford Smith, Lawyer for Guantanamo detainees,
including Moazzam Begg] What's particularly pernicious in
40 Guantanamo Bay is there is no sense of when it's going to end,

or if it's going to end. And the reason that prisoners go on
hunger strike, for example, and may starve themselves to
death, is, in the words of Omar Deghayes, *"I'm dying slowly
here in Guantanamo as it is. So I may as well take my life into
my own hands."*

TOUR INTERROGATION ROOM

[Brigadier General Jay Hood, Commander Joint Task Force,
Guantanamo 2004-2006] I have no intention of holding
somebody here any longer than he is a threat to our country or
that he has intelligence or information that could be valuable to
us in the global war on terror.

TOUR CELL

We continue to collect information of value from the men we're
holding today.

[Moazzam Begg, 20 months in isolation, Guantanamo] One of
the reasons why I was held in isolation was to do with this issue
of witnessing these deaths in Bagram. And they asked me which
soldiers had been involved, and where they were at the time.
And so they brought in photographs of the people from the unit.
And I pointed out who I believed was involved. They asked me
— one of the strangest requests I've ever had during the time I
was in incarceration — and that was, *"Would I be willing to
stand up as a witness for the prosecution in a trial against these
soldiers?"* And I thought, *"How ironic this is."* You know. *"Is
this the only court that I'm going to get to see after all these
years in incarceration?"*

THE RULE OF LAW

[Narrator] The cruel ironies of the Dilawar story echoed an
ongoing debate in the halls of Congress about detainee abuse,
national security, and the rule of law. For one senator, John
McCain, a former prisoner of war, the matter of detainee abuse
was both political and personal.

1 [John McCain, North Vietnam, 1968] I would just like to tell
my wife I'm going to get well, I love her, and I hope to see her
soon. And I'd appreciate it if you'd tell her that. That's all.

5 *LT. CMDR. JOHN MCCAIN*

[Jack Cloonan, FBI Special Agent 1977-2002] If this man, after
6-1/2 or 7 years of torture, says that it's not efficient, it's inhumane,
and it breeds contempt for the United States, he can stand up
10 and be a moral voice on this issue.

[Senator John McCain] We sent them to fight for us in Afghanistan
and Iraq. We placed extraordinary pressure on them to extract
intelligence from detainees. But then we threw out the rules
15 that our soldiers had trained on, and replaced them with a
confusing and constantly changing array of standards. And when
things went wrong, we blamed them. And we punished them.
I believe we have to do better than that. I strongly urge you to
do justice to your men and women in uniform. Give them
20 clear standards of conduct that reflect the ideals they risk their
lives for.

[Narrator] On October 5, 2005, as increasing numbers of
detainee abuse cases came to trial. Senator John McCain
25 proposed the Detainee Treatment Act. The bill sought a total
U.S. ban on torture. As well as cruel, inhuman and degrading
treatment. And it sparked a national debate. One in which the
Devil was in the details.

[Senator John McCain] Is it still permissible to use a wet towel
and dripping water to induce the misperception of suffocation?
[Lt. General Randall M. Schmidt, Author of "Schmidt Report"]
The use of the wet towel, dripping water to induce the
misperception of suffocation was one of the techniques requested
35 by the JTF in their laundry list given up. It was never approved.
It has never been a technique approved.

[Professor Alfred McCoy, author *A Question of Torture*] One of
the techniques that made the transition from the regime of the
physical to the psychological — in fact the only one — was
40 waterboarding. Because in the medieval era, under the
Inquisition, it was done because of its horrible, physical aspects.

It was done to purge and punish the heretic. You force water down the throat of the victim. The victim thinks that he's drowning. It's horrible. Your body tells you that you're dying. 1

CIA AGENTS ARRIVE AT BAGRAM 5

Right after 9/11, the CIA got approval from the White House for waterboarding.

[Narrator] An early test case involved the interrogation of Ibn Sheikh al Libi, a man suspected of being the Emir of an al Qaeda training camp. Initially, the FBI was in charge of his interrogation. But the Administration was impatient with the slow results of the FBI's law enforcement techniques. So they turned al Libi over to the CIA. 10 15

[Jack Cloonan, FBI Special Agent 1977-2002] He is secured. He was either duct-taped or hooded. And he was going to be put into a box — a plywood box for his own protection [makes disbelief sound] — for transfer to the airport. 20

[Professor Alfred McCoy, author *A Question of Torture*] They throw him on an aircraft, and they rendered him through extraordinary rendition, to Egypt. They later subjected him to two weeks of brutal torture, involving all of these techniques, including waterboarding. And they got information from al Libi stating that Saddam Hussein's regime had trained al Qaeda in chemical and biological warfare. 25

[Scott Horton, Attorney] One of the things we know about torture is that someone who is tortured will tell his interrogator what he thinks the interrogator wants to hear. 30

Khmer Rouge Waterboarding Slab 35

[Col. Lawrence Wilkerson, former Chief of Staff to Colin Powell] The moment al Libi was waterboarded, he started blurting things out. Well, rather than questioning what he was saying, and going into it in detail to see if what he was saying could be corroborated, they immediately stopped and ran off to report what al Libi had said. And ended the torture. And bang — it gets up to the highest decision-makers — and all of a sudden Colin Powell is told, 40

1 "Hey, you don't have to worry about your doubts anymore,
because we've just gotten confirmation that there were contacts
between al Qaeda and Baghdad.

5 [Narrator] In February, 2003, then Secretary of State Colin Powell
went before the United Nations to make the case for the war in
Iraq.

10 [Colin Powell, Secretary of State] I can trace the story of a senior
terrorist operative telling how Iraq provided training in these
weapons to al Qaeda. Fortunately, this operative is now detained,
and he has told his story.

15 [Professor Alfred McCoy, author A Question of Torture] A year
later, the CIA branded al Libi a fabricator, and rescinded all of
the intelligence reports with that information in it. So, in other
words, you will get information, but you'll get false
information.

20 [Scott Horton, Attorney] I think Colin Powell said that was the
most embarrassing day of his entire life.

25 [Rear Admiral John Hutson (ret) Judge Advocate General] All
the experts say that torturing people is not the best way to get
information. Breaking down the barriers between you and them,
gaining their confidence is the best way to get it. It takes some
experience. It takes some talent. It takes some patience. And
then they might actually tell you something that is worthwhile.
And then if you want to prosecute them and execute them, go
ahead.

30 [Jack Cloonan, Counterterrorism Task Force] If you want to be
able to build a rapport with somebody, you are their salvation,
because their life as they know it is over.

35 *Jack Cloonan, Counterterrorism Task Force*

40 "Is there something I can do for your kids? You concerned about
them? Do you want them educated? I'll get them educated. What
do you want? Tell me what you want. Script for me your exit
strategy." "How do you extricate yourself from this terrible

situation that, by the way, you put yourself in?" "Now, you 1
 can't go back home, can you? No. So let's make peace with 1
 that. Let me help you find the strategy to give you a life."
 And that's the way it worked! The amount of information that
 they were able to provide us, pre-9/11, to me it was extremely 5
 valuable. Who else was going to tell us about how you joined
 al Qaeda? What did buy-out mean? How did they
 communicate? Did they use Emaar-set satellite phones. Did
 Bin Laden use a body double? So when we got all that
 information, we were able to do certain operations. 10
 Cumbersome though it may be, it still to me was the way to
 do it. And we don't have to apologize to anybody. We don't
 know what revenge is coming down the road. And if I wanted
 to incite the faithful, I'd just take that one picture with the
 dog collar on, and just point to that. And look at the young 15
 brothers and say, "You're duty bound now to get revenge."

THE TICKING TIME BOMB

[Professor Alfred McCoy, author *A Question of Torture*] The 20
 advocates of torture generally focus on the hypothetical. They
 have this ticking bomb scenario they talk about ...

[Clive Stafford Smith, lawyer for Guantanamo detainees] which 25
 is, imagine that there's a ticking time bomb in Times Square. It's
 about to go off. We've got the guy in custody. He says he wants
 a lawyer. Do we respect his right to a lawyer? Or to save a million
 lives do we apply the electrodes to his testicles?

[Professor Alfred McCoy, author *A Question of Torture*] 24, week 30
 after week, has on-camera displays of brutal torture ...

[Kiefer Sutherland] *Just tell me what your connection with the 35*
terrorists is?

designed to stop some terrorist with a ticking bomb from killing
 hundreds of thousands, if not millions, of Americans.

[Superior] You're talking about torturing this man?

[Kiefer Sutherland] I'm talking about doing what is necessary to 40
 stop this warhead from being used against us.

1 [Clive Stafford Smith, Lawyer for Guantanamo detainees,
including Moazzam Begg] It's just nonsense, though! Because
then you ask, *"Hey, name me one time in the last 500 years*
5 *when we've had someone in custody with a ticking time bomb?"*
[Jack Cloonan, Counterterrorism Task Force] The likelihood of
that ever happening is sooooo remote. Even if you're in that
situation, who is to say if you beat 'em up, that you're going to
get that information? If a guy is that committed, I think he'll die
before he gives it up.

10 [Professor Alfred McCoy, author *A Question of Torture*] Right
after the release of the Abu Ghraib photos in mid-2004, 35% of
Americans polled believed that torture was acceptable under
some circumstances.

15 *Murdered detainee, Abu Ghraib*

Even after the Abu Ghraib photographs. And I think that shows
the way that this kind of popular culture has built a constituency
20 for torture, which allows the Bush White House to get away
with the way it twists laws and treaties, and doesn't spark popular
outrage.

25 [Narrator] On a conservative radio show, Vice-President Dick
Cheney openly defended the practice of waterboarding.

[Scott Hennen, WDAY North Dakota] Would you agree, a dunk
in water is a no-brainer if it can save lives?

30 [Dick Cheney, Vice President] Well, um, it's a no-brainer for
me, but for a while there I was criticized as being the Vice
President for torture.

35 ["President" George W. Bush] We do not condone torture!

[Scott Horton, Attorney] *"We do not torture"*! Footnote: *"As we*
define torture. Which means exactly what we wish it to mean,
and nothing else."

40 [Narrator] In the elections of 2006, the Bush Administration
openly campaigned for harsh techniques the rest of the world
defined as torture. Bush and Cheney played on the fears of voters

and politicians. If Congress didn't give them the power to do whatever was necessary, how could Americans be safe?

[*"President" George W. Bush*] In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States in a separate program operated by the Central Intelligence Agency. Some ask, "*Why you are acknowledging this program now?*"

THE CIA PROGRAM INCLUDES:

WATERBOARDING

FORCED NUDITY

FORCED STANDING (UP TO 40 HOURS)

Some believe our Military and Intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act! Simply for doing their jobs in a thorough and professional way! This is unacceptable!

[Narrator] The President was forced to disclose his secret CIA program when the Supreme Court acted to limit his wartime powers. In the historic Hamdan decision, the Court ruled that interrogations and trials of terrorists would be governed by the Geneva Conventions.

[*"President" George W. Bush*] This debate is occurring because of the Supreme Court's ruling that said we must conduct ourselves under the Common Article III of the Geneva Convention. And that Common Article III says that there will be no outrages upon human dignity. It's a, it's a, it's a, like — it's very vague! What does that mean?

[Senator Carl Levin, Senate Armed Services Committee] Do you believe that the use of testimony which is obtained through techniques such as waterboarding, stress positions, intimidating use of military dogs, sleep deprivation, sensory deprivation, forced nudity would be consistent with Common Article III?

1 [Alberto Gonzales, Attorney General] Well, sir, I think that most
importantly, I can't imagine that such testimony would be
reliable.

5 [Senator John McCain] Mr. Attorney General, do you believe
that statements obtained through illegal, inhumane treatment
should be admissible?

10 [Alberto Gonzales, Attorney General] Senator, well, again — I'll
say this: the concern I would have about such a prohibition is,
"What does it mean?" "How do you define it?"

15 [Narrator] And WHO would define it? The Bush Administration
introduced a new law that would elude the restrictions of the
Supreme Court.

20 [Col. Lawrence Wilkerson, former Chief of Staff to Colin Powell]
In a legal sense, I think they wanted to discard the Constitution.
And they wanted to write a new one. But you can't do that.
So what you do is you throw a new interpretation on the old
one. And the new interpretation is the Executive in wartime
— and perhaps this war is going to last forever — is all
powerful.

25 Contrary to the Government's assertion, even *Quirin* did not
view that authorization as a sweeping mandate for the President
to invoke military commissions whenever he deems them
necessary. Rather, *Quirin* recognized that Congress had simply
30 preserved what power, under the Constitution and the common
law of war, the President already had to convene military
commissions—with the express condition that he and those under
his command comply with the law of war. See 317 U. S., at 28–
29. Neither the AUMF nor the DTA can be read to provide
35 specific, overriding authorization for the commission convened
to try Hamdan. Assuming the AUMF activated the President's
war powers, see *Hamdi v. Rumsfeld*, 542 U. S. 507, and that
those powers include authority to convene military commissions
in appropriate circumstances, see, e.g., *id.*, at 518, there is
40 nothing in the AUMF's text or legislative history even hinting
that Congress intended to expand or alter the authorization set
forth in UCMJ Art. 21. Cf. *Ex parte Yerger*, 8 Wall. 85, 105.

Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Art. 21 or the AUMF, was enacted after the President convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war. Absent a more specific congressional authorization, this Court's task is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. — *Hamdan v. Rumsfeld*, decided by the United States Supreme Court on June 29, 2006

[Narrator] Congress gave the President most of what he wanted. He would agree to abide by the Geneva Conventions so long as HE could define their meaning and application. A few detainees at Guantanamo might be put on trial. But the rest would no longer have access to habeas corpus: the fundamental legal right to challenge their detention. Planning a run for President, even Senator McCain voted for the bill soon after the Bush Administration threatened to discredit him with Conservative voters.

[The Cafferty File — Immunity from War Crimes?] Buried deep inside this legislation is a provision that will pardon President Bush and all the members of his Administration of any possible crimes connected to the torture and mistreatment of detainees dated all the way back to September 11, 2001. At least President Nixon had Gerald Ford to do his dirty work. President Bush is trying to pardon himself.

[Narrator] The pardon did not extend to frontline soldiers.

[Pfc. Willie Brand, Convicted: Assault, Maiming, Maltreatment] The trial was a very confusing time for me, because I've never been through a trial before. I didn't know what was really going on. I kind of just understood that, you know, I was facing a lot of time in jail. That's the only thing I really understood about the whole thing.

Pfc. Willie Brand, Convicted: Assault, Maiming, Maltreatment

1 [Sgt. Anthony Morden, Pled Guilty to: Assault, Dereliction of
Duty] Well, I was sent to jail, to a Military Correctional facility.
I've lost my full-time job. I have a bad-conduct discharge which
5 has hindered me in getting a new job in the same field. I —
financially it's just devastated me.

10 [Pfc. Damien Corsetti, Acquitted: Assault, Maltreatment,
Dereliction of Duty, Use of Hashish, Performing an Indecent
Act] I'm just glad it's over. That's it. Glad I can get on with my
life.

15 *Pfc. Damien Corsetti, Acquitted: Assault, Maltreatment,
Dereliction of Duty, Use of Hashish, Performing an Indecent
Act*

20 [Spc. Glendale Walls, Pled Guilty to: Assault, Dereliction of Duty]
I had to plead guilty to assault, and two counts of dereliction of
duty. In exchange, they would say that I could go to jail for no
more than four months.

25 [John Galligan, Willie Brand's Attorney, Former U.S. Army
Judge] Rather than spend the money that was being spent for
that trial, I think it could have been better spent in working
on Army doctrine to make sure that other people go into battle
properly equipped, properly led, and with a full
understanding as to what their new roles and responsibilities
are.

30 [William Cassara, Damien Corsetti's Attorney] When a detainee
is abused, or a detainee claims abuse, they want somebody to
take the fall for it. And it's not going to be the person with eagles
or stars on their shoulder.

35 [Narrator] No officer was ever convicted in the Dilawar case.
Following her service at Abu Ghraib, Capt. Carolyn Wood was
given a staff position at the Army Interrogation School in Fort
Huachuca, Arizona.

40 [Scott Horton, Attorney] What does that reflect in terms of Senior
Leadership's intentions? Not to eradicate the abuse, but to
perpetuate the abuse.

[Alberto Mora, former Navy General Counsel] I think the probabilities exist that there will be other terrorist attacks. That more Americans will die. And the argument that we have to apply abuse to detainees in order to protect American lives, I find to be violative of our deepest values, and to the very safety of our country. We fight not only to protect lives. We fight to protect our principles. 1 5

[Col. Lawrence Wilkerson, former Chief of Staff to Colin Powell] If you say, over the course of Afghanistan, GTMO and Iraq, we've detained 50,000 people, I'd say that less than 1% were terrorists. 10

** as of Sept. 11, 2006, the number detained reached over 83,000*

** none have been brought to trial* 15

Were some of them insurgents? Probably. Were almost all of them in Iraq, in particular, going to become insurgents after their treatment? Yes. 20

[Moazzam Begg, Detained at Bagram and Guantanamo] I was kidnapped, abducted, forced into prison, tortured, and threatened with further torture, without charge. Without trial.

Moazzam Begg, Released due to Pressure from British Government 25

Even many soldiers had said to me afterward, "Wasn't it hell when you weren't a terrorist when you came in here, by the time you leave, I'm sure you would be because of the way you've been treated." 30

[Jack Cloonan, Counterterrorism Task Force] I think there's a certain level of prejudice that this religion, and the people who have hijacked it, have such a disregard for life, that we turn around and say, "If they think so very little of life — and clearly 9/11 exemplified that — screw them!" Anything goes." 35

[Afghani Man] We in the village come to Dilawar's grave to pray for his departed soul. I pray for him and the others in the cemetery. 40

1 Grave Marker: Dilawar the martyr. Yakubi village.

5 [Shahpoor, Dilawar's brother] What should I say to the Americans? My brother was innocent. He was barely more than a child and they killed him. Since he died, I cannot taste my tea. I cannot taste my food. I cannot taste anything. Imagine you leave here and someone along the road kills you. In what state will your children and wife be? How would your father feel?

10 [Tim Golden, New York Times Reporter] It's not surprising that at the end of all this, Dilawar, the victim, was really lost. I mean, Dilawar was almost invisible in the trials. I mean, you never saw pictures of him. Nobody ever mentioned this man's wife and child who were left without a husband and father. He was
15 not part of the picture at all.

[Afghani Man] Dilawar could not work in the fields, so he said, *"I will take the taxi"*, and bring the family meat and potatoes in the evenings.

20 [Tim Golden, New York Times Reporter] There's a lot of other people out there who are going to run into this system unless it's fixed. And you only need one to sort of remind yourself of what it's capable of.

25 [Alberto Mora, former Navy General Counsel] American values are premised upon the notion of human dignity, and the sanctity of the individual. To allow for cruelty to be applied as a matter of official policy, is to say that our forefathers were wrong about
30 these inalienable rights.

[Spc. Tony Lagouranis, Military Intelligence, Iraq] Americans obviously want to believe that we're somehow more moral than
35 the rest of the world. For some reason we have a real strong desire to feel that way. And I think that's eroding. I don't really know what effect that's going to have on us. And I think a lot of people have just decided, *"Well, you know, it's different now after 9/11. We can't be good anymore. We have to get tough."* And so we'll have to see what that does to us.

40 [Narrator] What do you say?

[Spc. Tony Lagouranis, Military Intelligence, Iraq] I think that's 1
bullshit, frankly. I mean, I think that we still need to try and be
as good as we can be.

WRITTEN & DIRECTED BY Alex Gibney 5

*Dedicated to my father, Frank B. Gibney, 1924-2006, WWII
Navy Interrogator*

[Frank B. Gibney] I find it utterly inconceivable that our highest 10
officials — Rumsfeld, Bush and Cheney — would not only
countenance torture but would actually advocate it. That really
destroyed my faith in the American government. Because through
World War II and the Korean War, where I also served, we had
the sense that we were on the side of the good guys. You'd 15
always get justice from the United States of America. People
would get decent treatment. And there was a rule of law. We
never forgot that. That behind the facade of wartime hatreds,
there was a central rule of law which people abided by. It was
something we believed. It was what made America different. 20

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ORIGINAL MUSIC BY Ivor Guest, Robert Logan 35

ADDITIONAL MUSIC BY Mario Grigorov

NARRATED BY Alex Gibney 40

[End of video – “Taxi to the Dark Side”]

Gurdial Singh Nijar:

Thank you Your Honours. It's just after 5, and an opportune
time to digest all that we have heard and seen today, and
therefore, I leave it in your hands, but I think we can commence

09 May 2012 – Session 1

Registrar Musa Ismail:

All rise.

Judge Lamin Mohd Yunus (President):

Prosecution and Defence Counsel, I have one point, I've something to say on the video: Whether both of you should make a small submission on the video yesterday afternoon. Whether that video should be struck out for being prejudicial or not. I'd rather both of you say something about it, in your submission. Proceed.

Gurdial Singh Nijar:

Thank you Your Honours.

The prosecution has prepared a written submission. I do not propose to read the submission. I will highlight key elements of the submission that we think important to establish a case beyond reasonable doubt against the accused persons.

We note that *there has been no submission that we have not established a prima facie case, so we act on the assumption that this is the final submission* and the onus on us is to prove beyond reasonable doubt that all of the accused should be convicted for the crimes as charged. My written submission is just being prepared. We have 5 for the bench at the moment. We had to make several amendments in the light of evidence that were adduced over the last few days. So I submit this.

[Registrar forwards Prosecution's submission to Judges]

Your Honours, I have also submitted, through the Registrar, for Your Honours kind attention, several bundles of documents and I just wish, the volumes are indicated. There is Volume 1(a) and 1(b) on cases. Volume 2 on Statutes, and Volume 3(a) and 3(b) as to the rest of the documents. There is also another bundle which is marked as a Supplementary Bundle.

All of these have been placed on your table for your facilitate reference. So all in there will be six (6) bundles of documents.

In addition, there will be, we have also submitted some additional of materials and the rest we will make available as the submission proceeds. 1

Before that, in response to Your Honour Justice Webre's query on the question of conspiracy and "to tidy up the charge," we have also submitted an amendment to the Charge. 5

So the amendment to the Charge is to after paragraph 18 of the charge which is to introduce two (2) new paragraphs: Paragraph 18A and paragraph 18B which reads, 10

"the aforesaid acts including the web of instructions, memos, directives, legal advice and action established a common purpose, joint enterprise and /or conspiracy to commit the crimes with which the accused are charged;" 15

and paragraph 18B, as a matter of abundant caution, we have also put this, 20

"further each of the accused is also equally principally liable for the aforesaid acts."

Thank you. 25

In the light of that amendment, and to clarify this, we will also like to submit an article which deals with this common plan to violate the Geneva Conventions as part of our submissions, and perhaps it's an opportune time now to have this placed before Your Honours. 30

[Registrar forwards a copy to the Tribunal]

I will take that up in the course of my submission, Your Honour. Can I proceed with my submission? 35

Judge Lamin Mohd Yunus (President):

Yes, proceed.

Gurdial Singh Nijar: 40

The prosecution was initiated on the basis of an investigation and recommendations by the KL War Crimes Commission in

1 its report of May 2012 and while a key finding of the report
was that there was more than ample evidence of torture, cruel,
degrading and inhuman act committed against the
complainants, it recommended that the following persons be
5 charged for committing the crime of torture, as regards torture
convention, and of course more generally, and committing
crimes against humanity in violation of the Geneva
Convention.

10 And all the 8 Accused, George W. Bush, then President of the
United States; Donald Rumsfeld, Secretary of Defense of the
United States; Dick Cheney, Vice-President of the United
States; Counsel to President Bush, Alberto Gonzales; Counsel
to the Vice-President, David Addington; Counsel to Secretary
15 of Defense, William Haynes; they are also charged. And there
are 2 additional lawyers who are charged and these were the
Assistant Attorney General and Deputy Assistant Attorney
General who were responsible for writing some of the
memorandums that we will be referring to on the basis of
20 which, we say, the crimes were sanctioned.

So on the basis of their recommendation, I am at page 2, the
prosecution, and I have the honour to be the chief prosecutor,
has brought the charge against the 8 accused before the
25 Tribunal. And as we know, the Tribunal is established under
Article 6 of the Charter and hears and determines cases
according to Part II, the Rules of Procedure and Evidence.

30 And the jurisdiction of the Tribunal with regard to these crimes
is set out in Part I, Article 7 which says, identified, the crimes
in which charges can be brought: crimes against peace, that is
over; crimes against humanity, and war crimes. And then the
crimes are described with some particularity in the remaining
provisions that follow.

35 Of course the most important thing in any trial, in any criminal
trial is the evidence that is adduced before the Tribunal and
the evidence must be established beyond reasonable doubt
that these acts were in fact committed.

40 It is our respectful submission that we have through
Prosecution Witness 1, Abbas Abid; Prosecution Witness 2,

Moazzam Begg; Prosecution Witness 3, Jameelah, and the supporting secondary evidence of Mr. Rhuheh and Sh. Abbas @ Shalal, established a systematic perpetration of crimes of torture and violation of the Geneva Convention.

Almost all the witnesses had a very consistent pattern, demonstrated a consistent pattern, by which these accused persons were first abducted, charged, broke into houses, demolished houses, they were handed over by bounty hunters, Pakistan authorities, for example. And then we see a very systematic course as to how they were dealt with. From the moment they were captured, if you like, they were subjected to the most barbaric and brutal conditions – goes beyond even the description of “severe physical pain and injury” that the Geneva Conventions talk about. They were brutalised in a manner which, in this day and age, is almost incredulous to believe. And I have set out at page 9 of my submission the whole litany of the kind of crimes that were committed. So in my submission I put there,

- Hooding for incredibly long hours,
- Short shackling where the hands and legs of a detainee are tied together, for prolonged periods of time, up to 7-8 hours,
- Shackling of the feet, body and hands for prolonged periods,
- Chaining in physically impossible postures, for prolonged periods,
- Shackling and chaining for long periods such as to cause severe and prolonged physical pain,
- Depriving sleep,
- Blasting loud noises continuously for prolonged periods,
- Beating continuously causing severe pain and injury,
- Confining in solitary and (often while hooded) for prolonged periods,
- Subjecting to extreme and physically unbearable conditions (extreme cold or hot, humid, devoid of sunlight),
- Overcrowding prisoners in small cells,
- Disallowing normal bodily functions in decent conditions, for example, not allowing to go to toilet, have

1 a bath, defecation in full view of others, abruptly ending
prisoners when carrying out such functions,

- Withholding food and/or drinks,
- Where food was provided, providing atrocious and
- 5 terrible food, Jameelah said that stank when she opened
the plastic bag,
- Humiliating: including by women officers,
- Using dogs to threaten and intimidate,
- Using electrocution, including of sensitive areas such
- 10 as genitals,
- Threatening to harm family members,
- Simulating torture of family members,
- Threatening to shoot with gun pointed at the head,
- Securing confessions through coercion and
- 15 inducements,
- Denying medical treatment,
- Dispensing hallucinating drugs, and
- Suggesting suicide.

20 And many of these acts were cumulative. This is not individual
acts committed on one individual person, but many of these
acts were combined and applied to almost all of the detainees.

25 Now the Defence, or *Amicus Curiae* carrying out the function
of Defence Counsel, may want to quarrel here and there,
"Okay, maybe this was not so well established or this was not for
that prolonged period and so on."

30 But we ask this Tribunal to **look at the sum totality** of the
nature of the acts that were committed against the accused
persons in a very systematic pattern to break these detainees.
So we have the evidence, at least of severe physical and mental
pain which is a criteria by which torture is adjudged, breach
of the Geneva Conventions is adjudged. I will not go into the
35 details to re-state individually the acts that were committed,
except to invite Your Lordships to look at pages 11 onwards.

40 For example Abbas Abid, you saw, they took out his
fingernails with a plier. They applied crude bare wires. And
he talked about the fact that they didn't even have
sophisticated weapons – what he meant was at least something
that is not so crude. They just applied wires to electrocute

persons. And he had even the sense of humour to describe what he have gone, the gruesome thing, he said, "*Oh, you'll be dancing.*" I asked him how you will react, and he was quite well-mannered about it. But beneath it it hides that gruesome act and we can well imagine the kind of pain, affliction, that he suffered – electrocution to his genitalia – not once, more than once. Hanging from the wall until his shoulder is dislocated. Residual injuries – all of them complained about residual injuries.

And we have, you know, they point guns to the head and click – which was a *game* they were playing – against other human beings in the face of established conventions and international law.

They bring the wife, or they threaten to bring the wife and the daughter; or they bring the daughter, hood her head and then they shoot and said she's died. *Just this one single act itself more than suffices to qualify as a violation.* But it was not. It was a cumulative act applied over and over again against Jameelah who could be your mother, my mother; who could be your sister, my sister. This was done.

And done by whom? Of course *Amicus Curiae*, through defence counsel, talked about, "*Oh, you didn't see, you saw his boots, you saw his this,*" but look at the totality of the picture. Was it Americans who committed it? Or was it something that was so isolated and the Iraqis or the Afghanis just did it? Unrelated, unlinked to the war in Afghanistan, unlinked to what is now established as an illegal invasion of Iraq by a war criminal who has been adjudged by this Tribunal to be a war criminal, Bush and Blair.

And so, we have this clear evidence. If you look, for example, at Moazzam Begg. He was kept, isolated, hooded for 9 months, no sunlight. Jameelah, a mother, nude, near nude, in front of her nephew who was nude, and who was being beaten. What is this? What kind of behaviour? What kind of animal are we dealing with, Your Honours?

So we say that the Tribunal had been shown very clearly evidence of witnesses, and I will come to that video itself,

1 treatment of prisoners by interrogators at Abu Ghraib in the
context of that invasion. So the Americans came in, barged in
the Humvees – that is not disputed, that was not challenged.
And the interrogation was done in their presence – they wore
5 uniforms, some of them; some of them wore “FBI” caps.
Sometimes, of course, they got Iraqis, or they got the Afghanis,
to deal at an immediate level with those interrogation, because
they don’t speak the language, the Americans. They come to
another country, they don’t care about the culture, the
10 sensitivities, render these people nude.

And then, we should not have an argument that, *“Oh, it was
the Iraqis who did it. The Afghanis who did it.”* They did, as
Jameelah said very clearly, in an air-base that was run,
15 controlled, by the Americans.

And then, of course, we had Moazzam Begg who showed very
clearly that he was handed over to the Americans. We had
some of the testimony in the statutory declaration even
20 identified the camp commandant, all Americans. So this was
the grand design of America, and as we shall show presently,
it was intended to be the grand design of America, it was
intended to be the grand design of Bush, Rumsfeld, Cheney.

25 So that deals with the point about whether it can be shown
whether it was Americans who were involved. And that is
important for us because all accused are Americans, and so
when you want to establish that there was a chain of command
leading up to the highest war criminal, in this context, ex-
30 President Bush, then it is important for us to establish this.

Now I come to the documentary film, *“Taxi To The Dark Side”*.
This film was mentioned by Moazzam Begg, the second
prosecution witness. What is the purpose of this film? We are
35 here so detached, sitting in this rather salubrious, luxurious
surroundings, that sometimes the essence of what is said, the
kind of brutality that is depicted becomes so detached from
our life experience that we just best examine and say, *“Oh,
yeah, they just wanted some information, so okay. They made her
40 nude – we are all nude at some point in a day ourselves. So what’s
the big deal? Is that torture? We get electrocuted sometimes ...”*
The whole idea of this *“Taxi To The Dark Side,”* and then I

said, *"Oh, you know, from here to here, small, we had 15 detainees,"* 1
 and you look at it, *"Eh, it doesn't look too bad, nice carpet,*
luxurious carpet." And so the video was brought in.

The video was brought in to bring to life what actually 5
 happened and to try to place for us, because for a Tribunal to
 decide whether it is torture – torture is a very serious crime,
 it's an international war crime; and for us to really understand
 whether this reached that level of torture, that kind of torture
 that should be abhorred by mankind, we brought this tape in, 10
 so that we can see.

It is not principal evidence, not primary evidence. It is
 secondary evidence. It's evidence in support to demonstrate.
 So we can quarrel with some aspects of the video, it matters 15
 not. Perhaps it was too long. Because Moazzam Begg
 mentioned it, we got it downloaded and showed it without
 editing. Maybe we should have edited it, and it would have
 been shorter and less laborious to watch. But it depicted very
 very clearly the conditions under which, and the kind of 20
 treatment – we saw bodies piled up. When we talk about
 bodies laying here, 15, 20, 117, 30cm by 30cm, difficult, it's
 almost preposterous, *"How can that be?"* But we saw that.
 Bodies were lined up, nude. All piled up like dead corpses.
 And so that was what that video was about – to depict that, 25
 as well as the fact of showing from the mouth of those accused
 persons, the utter disdain for international law because we
 heard Dick Cheney talked about it. We heard Rumsfeld talk
 about it.

30
 When we saw John Yoo talk about it, very casual, cavalier
 manner, *"Yeah, I gave advice, this doesn't apply. So what?"* – he
 is saying. He now occupies a distinguished position at, if I'm
 not mistaken, University of California at Berkley.

35
 The message was: These are the criminals, and this is how
 they act, this is how they behaved, in the context of the kind
 of treatment they meted out to detainees. And we just brought
 a sampling of those. And Jameelah, mother, wife, her
 concluding remarks were that these were merely a *"tip of the* 40
iceberg." That unusually cruel, degrading, inhuman treatment
 was merely a tip of the iceberg.

1 So what do these acts amount to? We saw these acts, so the
evidence is there. And I turn to page 15 of my submission.
Now we say that these acts amount to torture generally under
international customary law as well as under the Torture
5 Convention, and we also say that this is cruel, inhuman and
degrading treatment in violation of Geneva Convention 3, and
insofar as there were civilians, Geneva Convention 4, and
Common Article 3 to the Geneva Convention. So let's look at
the law in respect of this, having established the evidence.

10 First let's look at torture, I will deal with each of these
components in turn. Torture – we had advance intimation
from Amicus acting as Defence Counsel, that torture is not an
international crime. Now international law jurisprudence,
15 since 1945, for example, has made it very clear, beyond
peradventure, that it is an international crime. It's a crime
against humanity. And if you look at Article 5 of the Universal
Declaration of Human Rights, I have it in my bundle 2, in the
40s, says,

20 *"No one shall be subjected to torture or to cruel, inhuman or
degrading treatment or punishment."*

25 This is not an international crime? Universal Declaration to
which all nations of the world are committed.

Then, prohibition against torture is absolute. There can be no
derogation from this rule. And I already submitted that this
has been pronounced and made clear by the International
30 Criminal Tribunal for the former Yugoslavia. It has been made
clear in the case of *ex parte Pinochet*, at page 16, paragraph (c),

35 *"There can be no derogation from this rule. It is accepted as a
jus cogens - a peremptory norm of international law from
which states cannot derogate."*

40 And this is the English House of Lords, no radical institution.
And they go on to quote, this is paragraph (d) at page 16, the
International Criminal Tribunal for the former Yugoslavia,
Prosecutor v Anton Furundzija, 1998, which says that this *jus*
cogens from which States cannot derogate enjoys a higher rank
in the international hierarchy than treaty law and even

'ordinary' customary law. And it has become, "one of the most fundamental standards of the international community," and this is our answer to the defence's preliminary objection that they gave that "*it is not an international crime*".

And Pinochet – Torture by public officials is "*without doubt regarded by customary international law as an **international crime***". This is the clearest pronouncement that we can ever find to refute the suggestion that this is not.

And so serious is this that nobody is immune from its reach. In the Pinochet case, ex-President Pinochet, who had carried out some of the most dastardly crimes, sought to seek immunity, he said, "*I'm immune. Whether I committed these crimes or not, that's another issue. But I'm immune because when I committed the crimes, I was a head of State.*" The Court said, "*No, no way.*" There is no excuse; there is no immunity from this fundamental precept which has existed from time immemorial – that you cannot torture someone else.

Now, so serious is the crime that when we look under the Torture Convention, Article 3, there cannot be even exceptional circumstances to excuse torture. So Article 3 of the Torture Convention says you cannot justify it on the basis of war, instability, even public emergency. Even your fears, even your "*War on Terror*", even your 9/11 construct – no exception. That's Article 3, and it appears in Bundle 2 at page 54.

So here, we have, for example, Geoffrey Robertson, just to make it very clear. Any breach of this absolute rule within a state "*elevates its conduct from an internal affair to an affront to global conscience which the world may intervene to prevent or even to punish.*" Geoffrey Robertson, Queen's Counsel, very respected; and the citation of his book is given at Bundle 3A.

So the Torture Convention vests universal jurisdiction, there is universal jurisdiction. What the Convention did is – there was always a crime of torture under international customary law, but there was no machinery for enforcement. So the Torture Convention 1984 did not create the crime of torture. What the Convention did was to provide *a machinery for*

1 **enforcement** so that those who are parties to it, and we shall
show, even if you're not a party to it but you go and commit
crime within the jurisdiction of a party – Afghanistan is a party,
by the way – so you go commit a crime, there is an enforcement
5 machinery which can be activated under the Torture
Convention 1984. Not a new law under international
customary law, but a machinery is provided.

And so I say here at paragraph 17(a),

10 *"The 1984 Convention on the Law of Torture subscribed to
by 113 states has reinforced this principle. State parties are
obliged to take action to punish torture committed within their
territory either by or against their nationals. The Convention
15 thus vests universal jurisdiction: it requires states to arrest
and bring proceedings 'where the alleged offender is present
in any territory under its jurisdiction' and has not been subject
to a request for extradition"*

20 because extradition means you send him to whoever has
requested. So, in the English House of Lords again,

25 *"The Torture Convention was agreed not in order to create
an international crime which had not previously existed but
to provide an international system under which the
international criminal – the torturer – would find no safe
haven"*

30 And offenders become *"common enemies of all mankind and all
nations have an equal interest in their apprehension and
prosecution."*

And so this is the value of this Tribunal. There is not only a
responsibility but an obligation if there's a universal crime.
35 For Blair to collect huge fees, there is an obligation on the part
of country to do something about it because this is a universal
crime. And these people get away with this because of the
extraordinary power that their nation wields. Because of the
extraordinary military machinery that they have that they can
40 unleash at any time, either by themselves, or through proxy.
And today they are in two arenas, and threatening to go into

the third arena. And also, the hidden hand behind other arenas. We know that. 1

So how does civilization react to this, in this day and age. Might is right? You know, if you do this in a family context, you can't do it. If someone comes and slaps somebody else, you say, "Hey, you can't do that." You got to reason. You got to do it logically. So what we say our children cannot do, we're gonna condone this act, done on a large scale, massively, in an audacious manner? And this is the role of this Tribunal – people's Tribunal. 5 10

We, very carefully, have to go through this evidence. Where there is none, throw it out. Because we must be very scrupulous in adherence to the very rules which we say others must obey. And so this is the sacred task that I say this Tribunal, Your Honours, are bestowed with a historic task. The world is watching. And on the basis of this, we embolden those who want to exercise universal jurisdiction, because it's not just their own political stunts, but the considered view of a Tribunal that has done through the paces of trial. 15 20

Of course, you can say, "Yes, Bush and Rumsfeld, they didn't attend." You cannot abort justice by refusing to attend. Can you imagine, somebody is charged for murder and he says, "Well, I'm not going to attend. I'm not going to appoint counsel." And gets away with murder. This is unheard of, unthinkable, unacceptable. And so there are rules, these rules that we have saying that there must be trial *in absentia*. These rules that we have are rules that are plucked from established rules which says that you can try a man *in absentia*. So this is the historic role of this Court. And it's so serious that the Torture Convention applies even to a single act of official torture. Even if you do ONE act, that suffices. And I've put the authority for that. 25 30 35

The Torture Convention defines 'torture' as 'the intentional infliction of severe pain or suffering, whether physical or mental, by or with the consent or acquiescence of a public official'. So it is very widely cast. "Acquiescence" suffices. If you know something is happening and you stand idly by, minimum, worst case scenario, you have committed torture 40

1 along with all the others down the line. From down the line
back up to those in positions of authority. And the term 'public
official' refers to 'official torture' and includes the Head of a
State.

5 The US is party to the Torture Convention. It became a party
in 1994, and it has even implemented, through domestic law,
Title 18 of the United States Code, the Torture Convention.
It's interesting – the key US officials have tried to avoid the
10 obligations of the Torture Convention through a variety of
ways. I have categorised 2 main methods by which they seek
to avoid the Torture Convention.

15 First, they said that Torture Convention talks about suffering,
whether physical or mental. So there must be a certain
threshold of torture before you can consider it as a torture.
Anything else below that is not torture. So all the acts that the
witnesses described to them, that's not torture: "Ah, that's
20 inconvenience, that's discomfort, there's some pain; there is
some mental implications." But it must cross a threshold. And
what they have tried to establish is that it must result in organ
failure. It must result in impairment of bodily function or even
death. So they redefined the word torture. That's the first
justification.

25 The second classification they have is, "*Ah, when we signed the
Convention, when we ratified it, we created our own understanding
of what we are going to commit ourselves and therefore that's it.
Torture Convention is limited in its application to us to the extent
30 of the understanding we express at it.*"

So let's just look very briefly at both these justifications.

35 First one, at page 19 of my submission. Essentially what they
said is this: "Torture is not torture unless you show me organ
failure. So I apply electrodes to your genitalia, to your penis,
show me that your penis has been destroyed." And it must
not have only that – even if destroyed, it must cause long-
lasting harm. So I just want to take it at this level first, because
40 I will show later that even by this criteria, we have enough
evidence.

This argument is set out in the memorandum by the Attorney General himself, Attorney General's office to President George Bush dated August 1st, 2002, given by Assistant Attorney General Jay Bybee, and it is in my Bundle 3A. Jay Bybee is Assistant Attorney General, Accused no. 7 in this charge. This is what he says,

"Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture it must result in significant psychological harm or significant duration e.g., lasting for months or years. We also conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party."

So this is their legal contrivance: Torture is not torture unless you show us this. And therefore they said, and on the basis of these, was the torture interrogation techniques laid, so they are free from torture – make sure no organ failure. What they are saying is, *"Yeah, it could be inhumane, but it's not torture."*

Now our submission to this is threshold.

First, it is not open to any Party to the Convention to redefine what constitutes torture in any way that suits it – you can't do that under the Torture Convention. You're prohibited from doing that.

Secondly, *"torture"* is not understood in the limiting way that the US has sought to suggest – and I will show how the rest of the civilised world, bar the 8 accused, understand torture.

Thirdly, we say, the acts are, in any event, so grave as to constitute torture under the Convention and there is high authority in support of this.

1 Can you limit what you say as “torture” unilaterally, and raise
the threshold of torture? We have Lord Hope in the Pinochet
case. He says the Convention is quite deliberately,

5 *“expressed in the widest possible terms... the preamble to the
Convention; to make more effective the struggle against
torture and other cruel, inhuman or degrading treatment or
punishment throughout the world.”*

10 The Vienna Convention on the Law of Treaties, which was
cited by Amicus, requires words in treaties to be given their
ordinary meaning in their context and in the light of its object
and purpose: Article 31(1). The ordinary or natural meaning
of the term ‘severe physical pain’ includes *“inflicting discomfort
15 or pain that is hard to endure”* – dictionary.com

This is a definition for all of us. We don’t need Attorney
General of the United States to tell us what is “torture”. In an
attempt to provide a contrivance for avoiding their
international obligation. And so we have also quoted
Webster’s New International Dictionary

25 Now what this memorandum tried to do, by this Assistant
Attorney General Jay Bybee, you see, what he did was, this is
how this lawyers with forensic manipulation, if you like, and
I say so with respect because I am a lawyer myself. What he
did, you know, he plucked out from various sources
selectively, a little quote here, a little quote there and tried to
build up a scheme that then undermines the law which he
30 was supposed to adhere to.

So what they did was, they took this definition from a US
Medicare statute, which dealt with the treatment of emergency
conditions. So there, emergency medical condition, for the
purpose of providing health benefit. So there is an emergency
35 developed, and you have to provide emergency medical
conditions under Medicare, an insurance-like treatment
mechanism. And so they took the definition there which says
*“when you apply emergency medical condition and on the basis of
Medicare, then you must show all these kind of things—organ failure,
40 impairment of bodily function, and so on so forth.”* So they took
that definition and implanted it into the Torture Convention

to say, "Ah, you see, I'm not plucking it out of a vacuum. I'm plucking it out of a particular LAW." But the law, in context, has nothing to do with the Torture Convention. It was how to deal with an emergency situation. So there, of course, emergency, these are the threshold, very high threshold, then you attend to emergency on the basis of Medicare.

So, again to reference to dictionary.com, 'emergency condition' implies "a sudden or unexpected state of affairs that requires immediate action". To suggest that torture must be equated to physical acts that relate to an emergency medical condition is a disingenuous contrivance and, with respect, entirely inappropriate. And such a construction would make a mockery of the attempt by civilized countries these many decades to outlaw torture through international consensus.

So first is – you cannot unilaterally limit. It's a contrivance. It's a dishonest intellectual contrivance by the accused no. 7, relied upon by the rest of the lawyers, and presented to the principal characters: Rumsfeld, Bush, Cheney.

The next point that I make, in this context, is: The world community understands it differently and rejects these kinds of contrivances, these kinds of definitions. And the rest of the world, bar these 8 people, understand the meaning in quite a different way. And I have quoted here 5 international bodies and 1 independent expert that make it clear that these acts that we have heard over the last 2 days constitute acts of torture.

The European Court of Human Rights unanimously established that repeated beatings during interrogation, causing severe pain over a period of time, amount to 'torture' and was not mere inhumane treatment. There was no gloss on the treatment.

Diane Beaver, the lawyer at Guantanamo whose opinion ultimately led to the institution of aggressive interrogation techniques, relied upon a 1970 judgment of a divided European Court of Human Rights to justify these techniques. The Court had there, I cite this at page 31, *Ireland v England* (1978) 2 EHRR 25, ruled that forcing detainees to stand for

1 long hours, placing black hoods over their heads, subjecting
them to loud noise and depriving them of sleep constituted
cruel, inhumane or degrading treatment that fell short of
torture. But that is outdated.

5 But don't take my word for it. Four decades old judgment –
Lord Hope, who also sat in the Pinochet case, writing extra-
judicially said that: *"It seems likely that the mixture of physical
and psychological pressures that were used in the case of the IRA
10 suspects would now be regarded as torture within the meaning of
Article 3 of the European Convention. ... Any inhuman and
degrading treatment which is used for the purpose of extracting
information or a confession will constitute torture"*.

15 And he quoted a more recent case by the same court that
applied 'increasingly high standards and greater firmness'.
So there we have it - Diane Beaver, her views on the basis of a
four-decades-old judgment, rejected by contemporary judicial
opinion, although writing extra-judicially.

20 And then we have the Committee, the UN body that is
implementing the Convention Against Torture. They also have
come out with a report. This was in the context of the
Committee Against Torture with regard to Israel's treatment
25 of Palestinians. And I've set out at page 22 what they say are
the interrogation techniques that constitute not only *"cruel,
inhuman, or degrading treatment,"* but also *"torture"*. And at
my paragraph, I say,

30 *"particularly evident where such methods of interrogation
are used in combination":* restraining in very painful
conditions; hooding under special conditions; sounding
of loud music for prolonged periods; sleep deprivation
for prolonged periods; threats, including death threats;
35 violent shaking; and extreme temperatures.

And they made it very clear that methods of interrogation
authorized by the Department of Defense, by Rumsfeld, such
as, and I have a list of it, amount to *"torture"* within Article 1
40 of the Torture Convention, and are a violation of Article 16
when the victim experience severe pain and suffering.

And the committee said, and this is the committee in charge – 1
 so don't take my word, or Amicus-Defence's word for it –
 they said,

*"a State party to the Convention is precluded from justifying 5
 such methods on "exceptional circumstances"*

So the UN Committee itself, implementing the Torture 10
 Convention, were precisely the kind of treatment that was
 meted out to prosecution witness 1, 2, 3, as well as the 2
 statutory declaration by Abbas and Rhuhel.

I have also quote here at page 23, Philippe Sands, and he 15
 looked at the "Torture Memos" and consulted an independent
 doctor, Dr Abigail Seltzer, a London-based doctor who had
 been a consultant psychiatrist for more than a decade, and
 asked her to evaluate the techniques: What does it amount
 to? Her words,

*"I doubt anyone of them (12 hypothetical clinicians referred 20
 to a log that set out similar interrogation acts) would this
 individual had not suffered severe mental distress at the time
 of his interrogation, and possibly also severe physical distress"*

She explained her use of the term 'distress' in place of 'pain 25
 and suffering' in these words:

*"The log contains clear descriptors of stress, or if you prefer, 30
 distress. From a medical perspective those descriptors are
 consistent with what the drafters of the Torture Convention
 might have had in mind when they used the term 'pain' and
 'suffering'."*

So here, we offer additional evidence of an evaluation done 35
 in respect of the definition.

Then we have the International Committee of the Red Cross.
 What is their view? They quote all the kinds of treatment,
 and they conclude, at page 24, at the top,

"... which in some cases was tantamount to torture..." 40

1 And it goes on to say,

5 *"The ICRC is ... that the construction of the Guantanamo system, whose objective is to extract intelligence information, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture."*

10 And the ICRC concludes its report by its statement: *'The practices described in this report are prohibited under international Humanitarian Law'*

I present this through the Registrar.

15 Now, we have another quote by the UN Committee Against Torture, the UN Human Rights Commission, and they concluded, *"that the use of some of the techniques – nudity, dogs, exposure to extreme temperatures – could give rise to extreme psychological suffering as to amount to torture."* And this is their
20 report which appears in my Supplementary Bundle.

The next point that I want to make in response to, *"this is not torture,"* is that this is torture in any event. Whatever criteria
25 you want to use, to apply – when we hear the testimony of these witnesses, and we also had evidence by prosecution witness that people died as a result of the torture. He saw the body slumped. And there is admission by the United States that these people died. We have the taxi driver – they showed the certificate. I ask that you look at the circumstances in which
30 we are tendering evidence: We can't get these people to come; we can't get that kind of information. To the extent we can, like the memorandum, we will be displaying them. But we saw very clearly the death certificate, the homicide, of this taxi driver. Bought a new taxi, took 2 customers, ended up 5 days later dead. And he was declared innocent, by the US
35 itself. And then the 2 passengers were taken to Guantanamo where they served more than 1½ years, subjected to this same kind of treatment. This is the kind of treatment that the evidence of which has, at least, been shown to this Court.

40 So what we say here, even if you raise the threshold, the threshold is reached. The acts, prolonged duration – they show

a distinct, a systematic pattern. They were designed to inflict this kind of punishment. Unbearable pain, because they wanted to extract information. At the end of the day, they were all released. These so-called, *"dangerous, high level criminals"*: The mother, the wife, Jameelah; the father, Moazzam Begg; Abbas Abid, good-natured, high officer in Iraq – all were taken in and later on were released like that.

And we saw the figures which are undeniable that most of them were released without any charges. Moazzam Begg was released without charge. Not only that, but the UK government even had to compensate him for the unlawful detention and treatment that was meted out in an undisclosed sum – some have said it had been quite high – but whatever it is, it can never compensate for the kind of treatment that was meted out to them. So they were actual admission.

So, even if you judge it by the predicative acts that the memorandum refers to, that must be satisfied, the threshold that must be satisfied; it is our respectful submission we have shown beyond reasonable doubt that it has satisfied that criteria. And we have shown, at paragraph (d), why this is so. And, in fact, we have said, that it is more serious that what the memorandum contemplates.

And if you look at page 26,

"The memorandum states that certain acts that consistently reappear in these cases are of such a barbaric nature that it is likely a court would find that allegations of such treatment would constitute torture."

One final point on this part: The US says they have an 'understanding' when ratifying the Torture Convention. The Attorney-General advised the US President that this would not violate the Torture Convention because of an understanding that the US had added to the Convention when ratifying it. It was this: That *"torture"* was limited to extreme form of cruel and inhuman treatment. I've set out this in my bundle.

1 But, as we make clear: ***You cannot have your own***
understanding as to the definition of the very basis, the
fundamental construct on which the Torture Convention is
based. You cannot say, "I agree that murder is an offence," but
5 then you say, "you see, if you kill, then my understanding is that
it doesn't amount to murder, because I have my own definition. It
must be something committed under the kind of rules that I
unilaterally ..." We can't have that. We can't have that kind of
reservation. We can't have that understanding. And the
10 Torture Convention makes that explicitly clear beyond
peradventure, and I invite Your Honours to scrutinize that.

That deals with torture.

15 Next we have violations of the Geneva Conventions. Did the
8 accused persons violate the Geneva Conventions. This is
question of law first: What are acts that constitute a violation
of the Geneva Convention?

20 The four Geneva Conventions were created in 1949 after
World War II. They ***crystalized customary humanitarian law***
because of the horrors that were inflicted by Nazi Germany.
They crystalized the rules and said that, "You cannot go down
that pathway because that constitutes, in international law, cruel,
25 *inhuman, and degrading treatment,*" CID, the acronym. They said
these are minimum standards that must apply to everyone.
So they have, for example, Geneva Convention 1 that deals
with "sick and wounded combatants," then treatment for those
at sea because in those days naval warfare was a big event,
30 and prisoners of war – Geneva Convention 3; and then you
had Geneva Convention 4 dealing with civilians caught up in
the cross-fire of war. So we have 4 Geneva Conventions. And
each one of them start off with 3 common articles. So these
are always referred to as "Common Article 3". All of them have
35 that, the 4 conventions. Let's look at the common articles.

Article 1, respect for the Convention "in all circumstances". This
means no excuse: You cannot say "national necessity". You
cannot say "9/11". You cannot say "self-defence". There are
40 some defences, where there is an "imminent threat," where you
can take out certain action. But otherwise, with regard to CID,
cruel, inhuman or degrading treatment – nothing.

Article 2, applies the Convention rules not only to declared wars but to *"any other armed conflict"* arising among the parties, and requires parties to abide by the rules even if other states do not. So you cannot say, *"Oh, Taliban doesn't agree with this, so I don't care. Their citizens count for nothing."* Such is the nature of this rule. So this excludes a familiar reservation to previous treaties entered by states only prepared to stick to the rules as long as their enemies did. 1 5

Then Article 3 promises a minimum of humane treatment in *"armed conflict not of an international character"* to all civilians and non-combatants. And as I shall show, this phrase *"armed conflict not of an international character"* has been extended to include all situations, all circumstances. 10 15

So these are the 3 minimum requirements of all persons involved in any conflict, in any arena, in all circumstances. This is a fundamental provision. Everyone taking part in hostilities, with regard to people they capture, people who are civilians, people who they think are combatants, people who think they are prisoners-of-war, and so on. So it covers everyone, any situation. And some acts are considered so heinous, so brutal, that they then go on to explicitly provide for that, that's additional. And these include cruel treatment and torture, outrages upon personal dignity – there is no humiliating or degrading treatment, and so on. 20 25

Now, Common Article 3 encapsulates customary law. In other words, it's nothing new. Acts don't create human rights. The existence of you as a human being entitles you to human rights. Human rights are established by your very being born, and therefore you're entitled to breathe, you're entitled to partake, you're entitled to freedom, and so on. All these declarations are merely encapsulations, or codification, of what is generally understood as being inalienable and inherent in your very existence as a human being – that is the point. 30 35

So Article 3 encapsulates this *"customary law"*. States begin to recognise it, and it becomes *"international customary law"*. When a large body of States recognise certain practices, it is internationally recognised, becomes international customary law. And with regard to humanitarian acts, it becomes 40

1 *"international humanitarian law"*. That's how international law
is generally established.

5 The official commentary to the Geneva Conventions makes
this clear that it applies to all situation, not just "armed conflict
not of an international character". And I make this clear there,
at page 29,

10 *"The scope of the Article must be as wide as possible."*

And you have numerous judgments of the World Court,
International Criminal Tribunal, and I've just summarised it
through by citing Phillipe Sands, *"There is no doubt that, in the
event of an international armed conflict, these rules also constitute
15 a minimum yardstick."* So the reference in the chapeau to
"armed conflicts not of an international character" have been
extended, if you like. And even the decision of the US Supreme
Court in *Hamdan v Ramsfeld* said,

20 *"the commentaries also make clear that the scope of the article
must be as wide as possible."*

I have set out here, at page 30, the relevant part of Common
Article 3 which I have referred to. By way of summary, page
25 31,

Prisoners must be treated humanely, at all times (Article
13);

30 They must be protected against acts of violence or intimidation
and against insults and public curiosity. They must be treated
with respect for their persons and their honour, in all
circumstances (Article 14);

35 Upon questioning, they are bound to give only their name
and rank, and so on, and

Any form of torture or cruelty is expressly forbidden (Article
88). And this applies, under Article 130, to interrogations as
well. And any act on a detainee that amounts to torture,
inhuman treatment or that causes great suffering or serious
40 injury to body or health is considered so serious as to be treated

as a “grave breach”. No excuses, not even necessity or national security; and if you violate, you become an international outlaw, and you are liable to prosecution in any part of the civilized world.

In fact Article 129 not only requires Parties to enact national laws to provide effective sanctions for person committing or ordering the commission of any grave breaches. It also obliges Parties to *search* for such ‘violators’ and charge them in their own courts, regardless of their nationality; or it may hand them over to other Parties for trial.

In fact we have, in our law, implementing legislation with regard to the Geneva Convention in Malaysia. And the United States also have the War Crimes Act which outlaws, criminalises, those violations of Common Article 3.

Then we come to the liability under the Rome Statute of the ICC. The US signed the Torture Convention – all these accused persons are from the United States. It signed, in fact if you look at the history of the negotiations of the International Criminal Court, you find that a lot of States made a lot of concessions to the United States in the expectation that they would become party; the United States participated and diluted a lot of the provisions. At the end of the day, they just signed, never ratified. This is the arrogance of this kind of power. This is what they do in almost all international negotiations that I’ve been involved in, environment, on behalf of the government. They will come there, not be parties, and then they dilute all the provisions until there is very little left, very minimal position, and then they don’t sign. And then, as you will see, they impose their will – but that’s another story for another day, I suppose.

Now the interesting thing is, under Article 12.2 of the *Rome Statute*, the ICC can exercise jurisdiction over any person who is a national of a state party, OR who has committed a crime on the territory of a state party. What does this mean? That *Afghanistan is a party*. It became a party on *10 February 2003*, which means that all these crimes that are committed on Afghanistan territory by Americans, they are liable to be

1 charged – they should be arrested and brought to the
International Criminal Court by the Chief Prosecutor.

5 Not only that. It's not just the minions, not just the underlings
– officers and so on – but whoever authorises the commission
of acts on the territory of a State party to the ICC is liable
under Article 12.2. And so, the UN Security Council and the
Chief Prosecutor has an obligation to charge these accused
10 persons if he can collect sufficient evidence and, in that regard
we are prepared to help, we don't mind even being designated
as chief prosecutors there. We can do what we think is
necessary.

15 And so we saw several witnesses against whom this was done.
They were picked up in Afghanistan. We have Rhuhel, we
have Moazzam Begg – very clear. They were picked up in
that arena and subjected to this kind of torture which is a
violation of the Torture Convention and therefore opens Bush,
Rumsfeld and so on.

20 If might was not right, as is the ethos that is established by
this high and mighty power through their military might; and
right was to be accorded the might, then the logical thing is
we would not be arguing this case here. Bush, Rumsfeld,
25 Cheney would not only be the subject of the ICC, but behind
bars by now. Not just a question of them showing they're upset
and hauling African leaders to the ICC or setting up Tribunals
in respect of some of this. The real crime, these are the real
criminals, in the forefront, right in our face, but they are
30 pushed aside and then we go onto lesser minions.

35 It's very interesting. The US knows it is subject to this in the
way I've described it. The point that I have made is not a point
of any great genius. It's a very obvious point. Article 12.2
makes it clear. Although I like to claim that it's some novel
point that I've established, it's not. It's a very established,
mundane point. They know this. And what has the US sought
to do? They have tried to avoid the effect of this provision by
coercing countries, parties to the ICC, to enter into bilateral
40 agreements granting immunity to US nationals who commit
such crimes. And I've got the quotation here,

"Legal opinion is clear that such agreements go beyond the ICC Statute and would not be enforceable before the ICC" 1

And let me say what the then UN Secretary General, Kofi Annan, said in the BBC News. This is what he says, he condemned *"an exemption from prosecution for US troops on UN peacekeeping duties"*, describing this as of *"dubious judicial value"*. 5

Now next I come to the fact: Who is protected by Geneva Conventions? Now, why do I raise this point? Because the United States, Bush and his legal advisors, all the accused persons, have said that, *"Oh, there is only certain categories of people,"* now another qualifier – unilateral qualifier – only certain kinds, groups of, people are subject to the Geneva Convention 3, not everybody. As we have, at pains, point out Geneva Convention 3 protects all persons – whether they are captured, or surrendered, whether in uniform, even if they take no part in hostilities – the Convention provides a list of categories of prisoners-of-war in Article 4, which I have set out in my bundle. So it applies to all those picked up in battlefields in, or relating to, an on-going war. 10 15 20

And we note that the war is continuing in Afghanistan and Iraq, despite the declarations of withdrawal. When you lose, you make an honour of withdrawing. Don't forget, the *"War on Terror"* is not officially ended. It's a war. If it's a war, then you are subject to this, these conventions – Geneva Conventions, Torture Convention. Even if you're in doubt as to the status of a person you pick up, the Convention, Article 5, states, 25 30

'such persons shall enjoy the protection of the Convention until such time as their status has been determined by a competent tribunal.' 35

So even if you have a doubt – you've picked up Moazaam Begg, you've picked up Jameelah – you're not sure what their status is, you continue to provide them with the protection afforded by the Geneva Convention until such time as a lawfully competent, lawfully constituted Tribunal makes a firm decision otherwise. So there's no excuse, in other words. 40

1 You cannot, therefore, avoid the obligation of the Geneva
Conventions by a deft re-labelling of the person as 'enemy
combatant', 'detainee', and 'terrorist'. You can't do that. You
simply can't under international law.

5 And you also cannot, as I've earlier said, say, "*Oh, I don't want
to give him that treatment because if he captures me he will not give
me that treatment – oh, these are Taliban, these are extremists, they
will shoot me or they will hang me, so I am not obliged to do that.*"

10 But this is exactly the kind of reasoning – flawed – against
international law that is being employed by the accused right
up to the former President of the United States, a war criminal,
as decided by this Court. At page 34, from his own book,
"*Decision Points*", this is what he says,

15 *"While our humane treatment of Guantanamo detainees was
consistent with the Geneva Conventions, al Qaeda did not
meet the qualifications for Geneva protection as a legal matter.
The purpose of Geneva was to provide incentives for nation-
states to fight wars by an agreed set of rules that protect human
20 dignity and innocent life – and to punish warriors who do
not. But the terrorists did not represent a nation-state. They
had not signed the Geneva Conventions. Their entire mode of
operation – intentionally killing the innocent – defied the
principles of Geneva. And if al Qaeda captured an American,
25 there was little chance they would treat him humanely."*

30 So, expediently expressly declaring prisoner as Al-Qaeda and
denying them the treatment. And we saw Moazzam Begg.
Al-Qaeda? He was released. Rhuhel, the young boy who went
on a lark into Afghanistan for a little smoke that was
prohibited in his own home country. Al-Qaeda? He was
released, compensated. Jameelah, head of the cooperative
union. Al-Qaeda?

35 And even if they were Al-Qaeda, it matters not. You have to
accord that kind treatment – Geneva Convention –
international law, not US-Bush law.

40 And what did the US Supreme Court decision in *Hamdan v.
Rumsfeld* says? It said exactly this point: You label them as
"*enemy combatant*", it does not take them out of the protection.

of the Geneva Conventions. This is the United States' Supreme Court itself saying. Now what did they do? I come to the next part.

They then made a contrivance of all kinds to say, to repudiate the Geneva Conventions, because they know they will be liable under the Geneva Conventions. So the best thing is to say, *"Why we don't have to follow the Geneva Conventions."* And I've set out here, that even the manuals of the US FBI and the Army relating to the handling of prisoners during interrogation and confinement incorporate Geneva Convention constraints, for example, Army Field Manual 34-52: Intelligence Interrogation, and I've included it in my Bundle 3A.

So the goal is to obtain reliable information without violating legality principles. And yesterday, Moazzam Begg said, *"I was prepared to sign anything because you say you are going to kill my wife."* Who won't want to save their wife? Jameelah said, *"I was prepared to do anything because you said you were going to shoot my daughter."* Because they are accused, and there is this threat to their immediate families. So what is the value of these kind of confessions anyway? But that's another question. But the CIA manual does not follow the Geneva Conventions standard, and I'll come to that later.

So from September 2001, there was a distinct move to avoid the obligations under the Torture Convention and the Geneva Conventions. So what they did? They got legal opinions. Always rope in the lawyers. In Nazi Germany you saw that as well – they had Alstotter, who drafted the civil and criminal law code to allow for extermination, for courts to be abolished, and so on and so forth. You can get the lawyers. The lawyers sometimes have been described, sometimes uncharitably, their main ethic is, *"never refuse a green buck."*

And so legal opinions were solicited, readily given. And there were a large number, proliferation, of opinions to the President, to Rumsfeld, that presented sustained arguments in one way that the Geneva Conventions were inapplicable to the prisoners. These orders were, in fact, acted upon. Executive orders were issued on the basis of these opinions. Directives were issued. Action memos were issued, as we shall

1 presently show. They were patently, the advice that was given,
and the directive that followed, flew in the face of the clear
provisions of the Geneva Conventions and the Torture
Convention.

5 And I have summarised these legal opinions and Executive
Orders at my pages 35, 36 and 37. I will be referring to them
in due course, but let's just look at the table.

10 On the 25th of September, Alberto Gonzales, who was the
Attorney General, his decision: Application of the Geneva
Convention on Prisoners of War to the Conflict with Al-Qaeda
and the Taliban, and he said, "*obsolete*" and "*quaint*".

15 Then we had John Yoo and Robert Delabunty and they sent a
memorandum on 09th January 2002, and they said, "*You can
ignore the Geneva Conventions when it comes to Al-Qaeda and
Taliban detainees.*" And George W. Bush happily, on 18th
20 January okays this memo, as did Donald Rumsfeld on the
19th January; and both those memorandums are included in
the bundle.

25 And then on 22nd January, Bybee sent a note to Gonzales and
Haynes, and there he advised, he said, "*As regard Al-Qaeda
and Taliban, armed forces may ignore the Geneva Convention.*"

30 25th January 2002, then the Attorney-General sends to the
President that he 'okay-ed' this memo which says, "*armed forces
may ignore Geneva Conventions.*" And George W. Bush 'okay-
ed' this memo on 07th February 2002.

35 And Jay Bybee to Gonzales, 07th February 2002, with regard
to status of Taliban forces, he says, "*Taliban militia not protected
by Geneva Convention – no need for tribunal to decide their status,*"
because the Secretary of State Colin Powell had said in a memo
that, "*You better have this established because of Article 5 that I
referred to, you must have somebody decide their status,*" he said,
"*No, no need to do all that. Don't worry about it. They're not
protected by Geneva Convention.*"

40 And I've also included for good measure this Paul Wolfowitz,
who was the Deputy Defence Secretary to Rumsfeld, who also

said, "Article 3 of Geneva 3, Article 5 may be violated." Paul Wolfowitz, we know, what happened to him – he was to the World Bank, and he had a moral issue. So much for him. 1

If you look at all these memos, there was this conscious and willful act intended not to treat the prisoners in accordance with the Geneva Convention. So we'll examine who of these are liable, my paragraph (e) at 37. The suggestion I just read out – *"the treatment is humane and consistent with the Geneva Conventions."* If it is consistent with the Geneva Conventions, why are you making such an effort through so many memos to establish that Geneva Convention does not apply? 5 10

If your intention is to act consistently with the Geneva Convention, then act in accordance with Geneva Convention. So these are these clever forensic mechanisms to say, *"Oh, the Geneva Convention don't apply, but never mind, we are going to act consistently with Geneva Convention,"* at the same time you have this whole panoply of advice and action memos to say they do not apply. 15 20

And Rumsfeld also issued action memos and other memos. He also said they are to be applied, *"humanely to the extent appropriate and consistent with military necessity."* So he qualifies in his own way. But he says, *"humanely,"* in his book, *"Known and Unknown,"* he said, *"humanely, yes, whatever it is, they have to be treated with humanity."* So these are the qualifiers that they put forward to show, *"no war crime."* 25

And now let's look at William Taft. William Taft was the top legal advisor at the State Department, that is Colin Powell's top advisor. William Taft IV. Let's see what he says in 2005, 30

"These standard qualifiers unhinged those responsible for the treatment of detainees in Guantanamo from the legal guidelines for interrogation of detainees reflected in the Conventions and embodied in the Army Field Manual for decades. Set adrift in uncharted waters and under pressure from their leaders to develop information on the plans and practices of al Qaeda, it was predictable that those managing the interrogation would eventually go too far." 35 40

This is what a top legal advisor says himself. And who are we to dispute this. He puts it in very cautious language – *"it was*

1 *predictable*". What do you expect when you tell them, "Go ahead,
these are the interrogation techniques. Apply what you can to get
the information that you want. Geneva Conventions don't apply,
don't worry. Torture Convention don't apply, unless you disrupt
5 *his organs*," What do you expect? So this is a voice from the
inside that you must listen to very carefully. So we say that
we have proved beyond reasonable doubt that this was going
to be the outcome of the detachment from the Geneva
Conventions and Torture Convention that was urged by these
10 memorandums, directives, and actions.

The moment, on the final day of the Bush administration
which was January 20, 2009; the following day, January 22, 2
days – sorry, after Bush relinquished power, Barack Obama
came in. On the second day, he repudiated all these executive
15 orders which authorised. So we have not only Colin Powell's
legal advisor, but also the present President of the United
States of America saying that, "*these memos, we repudiate them*,"
2 days after ... I'm sure he had so many other things to do, but
this became a very urgent matter because of the image that
20 the United States was perpetrating throughout the world, so-
called "*champions of human rights and democracy*" – very
concerned that there is one dissident in China that Clinton
has to go there to make speeches to all the media. One person.
25 And here, 720 people, most of them released. And not a
whimper of apology from these war criminals.

And this is what he said, Barack Obama; he issued an
Executive Order 13491 on January 22 2009 which provides
30 that,

*'when conducting interrogations, US government officials,
employees and agents, "may not rely on any interpretation of
the law governing interrogations issued by the department of
35 Justice between September 11, 2001, and January 20, 2009"*
*(that is the final day of the Bush administration), absent
further guidance from the Attorney General.'*

That is so remarkable. We have, of course, in our midst, ex-
40 Prime Minister. Can you imagine saying to your country, "*that
whatever the Attorney-General said between here and here is rubbish,
ignore it. Goes out of the window.*"

This is the clearest indication, clearest evidence, beyond any doubt, that these techniques were violating international law. So these reinforces our submission that the 4 pieces of memorandum; he says ANY interpretation of the law governing interrogation issued by the Department of Justice, this is Jay-Scott Bybee, the 7th accused, John Yoo, William Haynes, David Addington, Alberto Gonzales – all of these people – their interpretation, “*rubbish*.” This is the President, Barack Obama.

So don’t take my word for it.

We need to know what specific provision of the Geneva Convention has been breached. In my pages 39 onwards, several pages, I will highlight some of the aspects. We must point to a particular provision that has been violated, that is the prosecution’s obligation.

“*Infliction of cruel treatment*” – Article 3. You cannot do that, and we have the evidence.

“*Outrages upon personal dignity*” – asking prisoners to be naked, tying them up one over the other, asking them to masturbate, and so on which we saw yesterday, in violation of Article 3.

“*Torture*” – violation of Article 3.

“*Failure to protect prisoners from intimidation*” – Article 13. This was securing confessions by coercive means, as they tried to do for all.

“*Use of weapons against prisoners*” – violation of Article 42.

“*Close confinement*” – in violation of Article 21.

“*Inadequate heating, lighting*” – Article 25.

“*Habitual diet ignored*” – Article 26.

“*Causing death of prisoners*” – Article 3.

1 *"Mutilation of prisoners"* – Article 3, you know, plucking out
fingernails with pliers.

"Reckless endangerment of health" – Article 13.

5 *"Denial of medical care"* – Article 15.

"Inadequate nutrition" – Article 26.

10 *"Inadequate recreational opportunity"* – Article 38, because he
was subject to solitary confinement.

 Then transferring them to all these places – Article 12.
Inhumane treatment while they were transferring them. They
15 were shackled up, blindfolded, suffocated, and they were
transported from Afghanistan to Guantanamo Bay. You know,
I travel to Montreal, on business class, and I am terribly
affected by that whole, and we all are, when we have to travel
such hours. And that in comfort. And this is shackled, chained,
20 from the waist, legs, muffled, hooded, and then are cutting
into your wrists, so much so that Moazzam Begg pleaded for
a sedative. And he was given a sedative.

"Failure to notify prisoners in advance" – Article 48.

25 *"Failure to allow prisoners to complain"* – Article 78.

"Confinement without daylight" – Article 87. Moazzam Begg
did not see daylight for 9 months, as he told us.

30 *"Punishment exceeding 30 days"* – Article 90.

"Failure to try prisoners in a regularly constituted court" – Article
3. Now this is very interesting. They brought them to
35 Guantanamo Bay, now this is one of the quirks of history,
they were chased out of Cuba, but they still maintain a little
part of Cuba and claim that this is theirs, but other citizens
cannot travel to any other part of Cuba, cannot even trade
with them. But they have a base there, army is there. So they
40 thought, clever, you know, again, legal contrivances, *"If we do
things outside of the United States, it's not subject to US Courts.
Very simple."* So all the due process, you cannot argue about

that because the US has got a long history on that. But you want near enough to control them. So what shall we do? Ah, Guantanamo. Very fast you can go there. 1

So what did Bush do? First, he put them in that place – that means they're not subject to US normal judicial tribunal. Then, he categorised them as "*enemy combatants*." He set up ad-hoc military commissions by an Executive Order. But the US Supreme Court, this was challenged in the case of *Rasul v. Bush*, said, "*You can challenge charges before trial in the normal US Court.*" 5 10

Then Bush authorised a system to determine, that he says, "*Okay, we will then set up military commissions. These military commissions will determine what the charges are and whether the charges are viable.*" The US Supreme Court in another case, *Hamdan v. Rumsfeld* declared that this system and military commission violated Common Article 3 of the Geneva Convention because that requires "*proceedings in regularly constituted court.*" And the Court also rule that the body was unconstitutional because only Congress can set up Tribunals like this. 15 20

Then he got Congress to pass the Military Commissions Act which allows military commissions. And what did Bush do to counteract? The ICRC said that these military commissions violated international law. The Supreme Court, in *Boumediene v. Bush*, invalidated much of the Military Commissions Act and Rumsfeld has admitted in his memoir: So that is the failure to try persons in regularly constituted courts. All the attempts, the contrivances, that were being made, the manipulations. 25 30

And then we have violation of,

Article 63 – to publicly state, inform how prisoners are to be treated; 35

not giving legal documents to prisoners – Article 77;

moral, physical coercion to induce admissions of guilt – Article 99; 40

1 failure to provide speedy trials – Article 103 of the Geneva
Convention is violated. First prisoner arrived in Guantanamo
2003. Until 2008, 5 years later, no one has been tried.

5 And then all the other violations in violation of Article 105.

And, absolving liability – Article 130;

they couldn't complain to the UN – Article 78 was violated.

10 And this is very interesting, which I stated in my last point:
Which is carrying out of experiments to test the level of stress
of human beings in violation of Article 13, Geneva Convention
III. You cannot use prisoners for experiment purposes. Why?
15 If you recall, Nazi Germany was carrying out experiments of
the most hideous kind on human beings, well-renowned
scientist within the German context were carrying out this.
So there is this prohibition. And this is exactly which is
prohibited under Article 13. And I have quoted here recent
20 reports which suggests that the prisoners were, in fact, guinea
pigs in an experiment to test, *"the measurability of optimum stress
levels"* – a program first developed in a different context by
Dr Bruce Jessen, the psychologist who was under contract to
the CIA. He had once written that the *"avenues appear
25 inexhaustible"* for further research in human exploitation.

30 *"Such 'research' appears to have been the main underpinning of the
Bush administration's torture program. The experimental nature
of these interrogation methods used on detainees held at Guantanamo
and at CIA black site prisons have been noted by military and
intelligence officials. The Armed Services Committee report cited a
statement from Col. Britt Mallow, the commander of the Criminal
Investigative Task Force (CITF), who noted that Guantanamo
officials Maj. Gen. Mike Dunleavy and Maj. Gen. Geoffrey Miller
used the term 'battle lab' to describe the facility, meaning "that
35 interrogations and other procedures there were to some degree
experimental, and their lessons would benefit [the Department of
Defense] in other places." [Bundle 3A: 619, 623]. This concern –
"the application of unproven techniques on individuals awaiting
40 trial" was also echoed by CITF's Deputy Commander, Mark
Fallon [ibid.].*

Can you imagine, these were the people who prosecuted – Jackson made some brilliant speeches in the Nuremberg trial in respect of the brutality that was inflicted and how this brutality must be addressed and people convicted, and he got a conviction, death sentences in most cases. And those were the experiments they talked about. And here, we have very clear admission from inside the armed services committee report that these experiments were being carried out to test the stress levels. And that is what we can – why all these hanging from there, and sleep deprivation, and then testing testing testing the limits as to how to treat human beings under stress for your own nefarious ends.

These are therefore the list of the various articles, numerous articles, there are many more, I won't labour the point. And now we come to the point as to who is liable. Who is responsible for all this?

Liability is not only those people who do it, but those people who acquiesced those who do it. I quote the House of Lord, at page 45,

"inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

And, *"The words are wide enough to cover not only the public officials or persons acting in an official capacity who themselves inflict torture but also (where torture results) those who order others to torture or who conspire with others to torture."*

And if you look at the US understanding of this same point, they state that *"for a public official to acquiesce to an act of torture, that official must, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibilities to intervene to prevent such activity"* – Senate Resolution of the United States of Advise and Consent to Ratification (1990)

I refer to the case of Yamashita. He was the commander of the Japanese forces in the Philippines in World War II. His soldiers committed brutal atrocities against the civilian population and

1 prisoners of war. And Yamashita had lost almost all command,
control, and communications over his troops when they were
committing all this. Nonetheless, the International Military
Tribunal in Tokyo based on the doctrine of command
5 responsibility held him liable and convicted him. And
interestingly, this decision was affirmed by the US Supreme
Court in *Re Yamashita* 327 US 1, 16 (1946). It held that by virtue
of his position as commander of the Japanese forces, he was
under an *"affirmative duty to take such measures as were within*
10 *his power and appropriate in the circumstances to protect prisoners*
of war and the civilian population." [Bundle S: 238 at 245].

So this is it. You have to take positive action. You cannot just
stand by and say, "After all, it was the Iraqi who are
15 conducting the interrogation through interpretation." It's like
me holding our very helpful interpreters liable for whatever
happens for something that I say when they are merely
interpreting the evidence that is being given.

20 It follows that any person in authority who issues orders that
violate would be culpable. This means that all those in the
chain of command including from those at the bottom of the
chain right up to its apex will be accountable. This would
include field personnel who are at the bottom, right up to the
25 President of the United States. The rest of the chain in-between,
the admirals, the generals, the top brass who received and
carried out the orders from the Secretary of Defense are also
actually liable – although we are only focusing on the liability
of the apex, and their legal advisors.

30 So let's examine now, having shown beyond reasonable doubt,
the culpability of each of the key players. Let's take George
Bush. At page 47. The culpability of Bush would arise if

- 35 • He issued orders authorizing treatment that would
constitute a war crime;
- He intended these orders to be acted upon;
- He had knowledge that these orders were indeed acted
upon;
- 40 • In any event, regardless of his orders, he knew that there
were violations of the Torture Convention and/or the
Geneva Convention III and failed to intervene to prevent
such activity.

And we say that the totality of the evidence establishes that President Bush issued executive orders to commit war crimes. We must not forget that he is Commander-in-Chief of the US military leads the conduct of the war in Afghanistan and Iraq.

So, obviously, as Commander-in-Chief, when he issues orders, or when his Minister of Defence issues the orders, these orders are intended to be acted upon. And he receives reports, of course, from time to time – we see, from the video “Taxi,” he comes every now and then to talk about how successfully they are launching, how successfully they have done this, and “mission accomplished,” and so on so forth. So he receives reports from battlefields as well as others, and he did nothing to stop these war crimes from being committed. In fact, he based his orders on legal opinions. He sought legal opinions. But this does not absolve him. The fact that a leader acts on the basis of advice does not exonerate him. All that is does is make those giving the advice equally culpable as he is.

Let’s look at his memorandum on February 7, 2002. He declared that al-Qaeda prisoners were outside the protection of the Geneva Conventions as they were ‘enemy combatants,’ not prisoners of war. This was a prelude, his order, to subjecting them to torture and inhumane acts because his order said that they are not liable. This is the signal that was sent to everyone: Geneva Conventions don’t apply. So it was this singular act that set in motion the use of aggressive and barbaric interrogation techniques in violation of international laws that ban torture, cruel, inhuman, or degrading treatment of prisoners, and it is also the summation of the nature of the acts by Elizabeth Holtzman (2006), at 118-119 [Bundle 3A: 637, 641-642].

And he also detained the prisoners in Guantanamo Bay, at the Southern tip of Cuba. Why? He wanted to take them out of the jurisdiction of the legal system. And, an appellate UK judge in the case of *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] All ER (D) 70 para 64 [Bundle 1A: 661, 675] described this as “a legal black hole”. Bush’s order created this and placed this detainee in a legal black hole, which means complete lawlessness – this is the view of the appellate court judge.

1 The British Attorney-General, Peter Goldsmith, he asked for
the Guantanamo prison to be closed as *"an unacceptable symbol
of injustice"*.

5 The US Supreme Court in the case of *Rasul v Bush* said that,
*"Guantanamo Bay, of course we can look at it. That's part of territory
that is under the unchallenged and indefinite control over
Guantanamo Bay."* So, US Courts have jurisdiction to determine
10 legality. This is what happened. He placed them outside of
this. That is the clearest evidence of beyond reasonable doubt
of all the violations, all the articles that I've talked about, if
you commit those crimes within that, and plan it this way,
this is beyond reasonable doubt.

15 And less than 2 months after the Supreme Court decision, the
government attempted to take away these powers to decide
this issue, and he signed into law the Detainee Treatment Act
2005 and it strips the Courts of the power to hear the
Guantanamo detainees' challenge. So the US Courts now,
20 because of this Detainee Treatment Act, cannot hear cases. So
Bush adopted the view that detainees could only access a court
for a very narrow set of claims after their initial designation
as 'enemy combatant' by a Combatant Status Review Tribunal
or after conviction by a military commission, neither of which
25 was mandatory to conduct.

Then Congress passed an amendment to the 2006 National
Defense Authorisation Bill to prohibit cruel, inhuman,
degrading treatment or punishment of prisoners in US military
30 custody, *the President lobbied against it*. Can you imagine?
They want to put forward an amendment to prohibit cruel,
inhuman, degrading treatment of prisoners in US military
custody, and he lobbied against it.

35 When he finally signed it – he was forced to sign it because it
was attached to the year's funding of the budget, so he had
no option – he issued a 'signing statement' that he was at
liberty to disregard the prohibition to prevent terrorist attack.
This was a signal that he could ignore the law that was
40 designed, by Congress, to restrain him from allowing torture,
to restrain him from violating the Geneva Conventions. So

Bush, in his memoirs, he admits to this. So he's absent, but we
can hear him through his memoirs. This is what he says, 1

*"CIA experts drew up a list of interrogation techniques that
differed from those Zubaydah had successfully resisted. George
assured me all interrogations would be performed by
experienced intelligence professionals who had undergone
extensive training. Medical personnel would be on-site to
guarantee that the detainee was not physically or mentally
harmed.* 5 10

*At my direction, Department of Justice and CIA lawyers
conducted a careful legal review. They concluded that the
enhanced interrogation program complied with the
Constitution and all applicable laws, including those that ban
torture.* 15

*I took a look at the list of techniques. There were two that I
felt went too far, even if they were legal. I directed the CIA
not to use them. Another technique was waterboarding, a
process of simulated drowning. No doubt the procedure was
tough, but medical experts assured the CIA that it did no
lasting harm.* 20

*I knew that an interrogation program this sensitive and
controversial would one day become public. When it did, we
would open ourselves up to criticism that America had
compromised our moral values. I would have preferred that
we get the information another way. But the choice between
security and values was real. Had I not authorized
waterboarding on senior al Qaeda leaders, I would have had
to accept a greater risk that the country would be attacked. In
the wake of 9/11, that was a risk I was unwilling to take. My
most solemn responsibility as president was to protect the
country.* 25 30 35

I approved the use of the interrogation techniques.

The new techniques proved highly effective."

...

40

1 George Tenet asked if he had permission to use enhanced
interrogation techniques, including water boarding, on Khalid
Sheikh Mohamed. 'Damn right,' I said.

5 Of the hundreds of terrorists we captured in the years after 9/
11, about a hundred were placed into the CIA program. About
a third of those were questioned using enhanced techniques.
Three were waterboarded.

10 So this is admission. Beyond reasonable doubt from the mouth
of the person, whom I would have loved to cross-examine on
this, if he was present. These statements are the clearest
admission of guilt that President Bush personally authorized
interrogation techniques that we submit violated the Torture
15 Convention as well as Geneva Convention III.

20 We ask the Tribunal to note that the detainees who testified
or provided statutory declaration who were interrogated by
the CIA after the issuance in December 2, 2002 of the enhanced
techniques.

25 So it is now very clear why they had to get all this advice
about avoiding, why the Torture Convention did not apply,
why the Geneva Convention does not apply. In this whole
thing that I've quoted from his memoirs, he said, "*This is risk
that I'm not prepared to take.*" What he's doing is pleading
"*national necessity, self-defence.*" He said, "*We were attacked
by terrorists, 9/11. What do you want me to do? I'm President of
the United States. I have a responsibility. So this is my defence.*"

30 But that's his view. Here we're dealing with everyone being
subject to international law. And international law makes it
explicitly clear, Common Article 3, it has to be applied to all
circumstances. So we reiterate our submission that you cannot
35 exclude – any excuse. This excludes any excuse of any
necessity or self-defence. And I've quoted Geoffrey Robertson
QC, and placed his material in my submission.

40 There are no exceptions with regard to defences under the
Torture Convention. Article 2.2,

"No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

And this is Article 2.2, which the US signed. So this contention in his book flies in the face of this express exclusion. And he's very defiant in his memoirs,

"The CIA interrogation program saved lives. Had we captured more al Qaeda operatives with significant intelligence value, I would have used the program as well." [Bundle 3A: 213].

So it's so simple. You just capture of anybody, as we heard yesterday – most of the persons were delivered because they issued a lot of these green bucks, they gave money to a lot of people, and those people began to deliver, bounty hunters, that is why most of them were never charged, many of them had been released. So very simple: Capture all of them, give money to people, the US way, capture them, try to get as much of information; if you don't, like the cooperative head of the union, respectable persons, you send a signal to everybody else – just torture so that when she goes out she tells people, *"Don't resist US occupation of you country."* Then say they are all of *"high value,"* as we heard Rumsfeld on the video yesterday. The taxi driver who bought his taxi and was on his first day out with 2 passengers; and his father was so proud that he managed to buy a taxi. And we saw at people at taxi stand shouting, like in the old days.

These high intelligence value applied these techniques, killed them, many of them. So this is what Bush is talking about. He says, *"The CIA interrogation program saved lives. Had we captured more al Qaeda operatives with significant intelligence value, I would have used the program as well."* These are the defiant words. No factual basis. Proof beyond reasonable doubt.

He said, *"al Qaeda did not meet the qualifications for Geneva protection as a legal matter,"* So he has decided. His cohorts have decided.

1 But *Hamdan v. Rumsfeld* said that it applied to all Guantanamo
detainees, whether they were Taliban or Al-Qaeda did not
make any difference. Their rights could not be violated – this
is the US Supreme Court saying that. And the Court also said
5 that the system of military commissions instituted by Bush
violated the Conventions. I've set it out, in what way they
violated the Conventions, at page 52(c).

10 A British judge of the House of Lords, labelled the military
commission and the procedures, "*kangaroo courts*." So clear
violation. And others have been outraged by the travesty of
justice. Human Rights Watch; I've set it out, the whole list at
page 53; Amnesty International, the US National Association
of Criminal Defense Lawyers, the UN High Commissioner
15 for Human Rights—all say Military Commissions is a travesty
of justice. And I've summarised all their comments at my
Bundle 3A.

20 And, of course, the US Supreme Court in *Hamdan* said that
they violate the UCMJ (Uniform Code of Military Justice) and
the four Geneva Conventions. And what did President Bush
said in his memoirs? He says, "*I disagreed strongly with the
Court's decision*" (p. 178). Says the man. His own admission of
guilt. He even refuses to acknowledge the wisdom, the
25 guidance, given by his own Supreme Court.

30 And so, he embarked on a course, after *Hamdan*, to try to
reinstate the military tribunal system. And he said the
American people, "*did not want Guantanamo detainees brought
to the United States and tried in civilian courts with the same
constitutional rights as common criminals*" (*Ibid.* p. 179). So, again,
using the spectre of fear, of national security, the 9/11, he
again embarked to enact the Military Commissions Act.

35 So in my conclusion with regard to George Bush I say, "*Reject
all his justifications. Recognise his comments for what they are—
audacious disregard of international law.*" And on that basis, we
pray that he be convicted as charged.

40 Now we come to **Rumsfeld**. He issued a Memorandum for
Chairman of the Joint Chiefs of Staff dated 19 January 2002.
He approved the 'advice' given to him by John Yoo, 8th

accused, and Robert Delabunty in a Memorandum they gave on 9 January 2002, and this memorandum said that the CIA was free to ignore the Geneva Conventions as they did not apply to suspected Al Qaeda and Taliban detainees.

Then he approved an Action Memo dated November 23, 2002 which attached 4 short documents. First was a legal opinion written by a Staff Judge Advocate at Guantanamo, Lt Col Diane Beaver dated 11 Oct 2002, stating that the memo on counter resistance strategies does not violate applicable federal law. The second document that was attached was a request for approval of the new methods of interrogating detainees from the Army head of interrogation at Guantanamo. The third document was a Memorandum dated 11 Oct 2002 from the Director of Intelligence of the Guantanamo Joint Task Force, Lt Col Jerald Phufer, addressed to the Commander, Joint Task Force, requesting for approval of the new methods of interrogating detainees. This document was sent to Rumsfeld by his Counsel, William Haynes by an Action memo dated 27 Nov 2002 seeking his approval of the interrogation techniques: [Bundle 3B: 995].

So, there was all these requests by various people at various levels seeking the approval by Rumsfeld to authorise enhanced interrogation techniques; and the document contained 3 categories of 18 techniques. Category II referred to 12 techniques aiming at humiliation and sensory deprivation. These included: stress positions (like standing for long hours – up to 4); falsified documents, solitary confinement for up to 30 days, deprivation of light, hooding during transportation, hooding during interrogation, 24-hour interrogations, removal of religious and all other comfort items, removal of clothing, forced shaving, and use of individual phobias, like fear of dogs, to induce stress.

Category III techniques included: use of scenarios to convince the prisoner that death or severe painful consequences were imminent for him and/or to his family, exposure to cold weather or water, and the use of a wet towel and dripping water to induce the condition of suffocation ('waterboarding').

1 There were these 3 categories, and they did not state the limits
for which they could be used; they did not preclude the use
of two or more techniques at the same time; they did not reject
these techniques, nor state that they were excessive, or illegal,
5 or contrary to the Geneva Conventions.

On the contrary, Haynes advised that *"all Category III
techniques may be legally available"* though *"as a matter of policy,
a blanket approval of Category III techniques is not warranted at
10 this time"*. Nor did they state that the techniques went against
long standing US military practice and went far beyond what
the US Army Field Manual 34-52 allowed.

15 This Army Manual applies to Ministry of Defence, and
Rumsfeld is the Minister of Defence. And what did Rumsfeld
do?

He approved the Action Memo by signing on it. And he added
in his own handwriting, because here they said, *"Asking for
20 permission to punish them by making them stand for long hours,
up to 4,"* and he wrote, in his own handwriting, which has
become very famous, *"I stand for 8-10 hours a day. Why is
standing limited to 4 hours?"*

25 And you saw in the video yesterday, that's the value of the
video, we saw him in his office, standing in a nice beautiful
office. He stands there for 8-10 hours – aside from the fact
that this doesn't sound credible, but never mind about that –
he's sitting in a nice comfortable office and he's comparing
30 that to the images that we saw of those detainee on boxes,
hands out, standing, for long durations. This is the nature of
the beast in authorising these techniques. He regrets now, in
his memoirs, he regrets having scribbled this comment
because it has been interpreted as saying, *"Why only 4, should
35 extend it."* But he said, *"No no no, I didn't mean it that way."*
You know, Minister of Defence saying, *"Why only 4 hours, I
stand 8 hours."* What is the signal that is sent to people down
the line? He says, *"No no no. All I meant I was just saying a fact
because I stand 8-10 hours in my office. That's all I say."*

40 When the beast is caught, look at the contrivances. Pathetic.

This memo was transmitted finally to Major General Geoffrey Miller who took over as Commander of the Joint Task Force at Guantanamo. Guantanamo received the memo on Dec 2 2002 and this was what marked a new and more aggressive phase of interrogation techniques and an even clearer and more decisive violation of Geneva Convention III and the Torture Convention.

When a Minister of Defence sends a Memo like this, what do you expect? It went right down through the chain of command right down to the field officers who were conducting interrogations and that is what the evidence what all about that we saw: the application of these techniques. So we see the clearest command responsibility that was being implemented at the field level.

And you know what he says? He now wants to justify the interrogation methods. In his memoir, which I have placed in Supplementary Bundle (Memoir: 580) [Bundle S: 230 at p. 233], he says,

"Any technique that is legal and humane on its own could conceivably be applied in ways that are not legal and not humane..."

The title of his book is "Known and Unknown." I think it's very appropriate. I don't know what is known and unknown in this.

"Any technique that is legal and humane on its own could conceivably be applied in ways that are not legal and not humane, if, for example, it is done repeatedly, over long periods of time or used in inappropriate combination with other techniques".

But, his own memo that he approved did not state the time limit, did not preclude the use of two or more techniques, did not reject any of these techniques, nor state that they were ...

So, by his own words he's condemned himself because he says, *"Even if these are legal and humane, they can be applied depending on the way in which they are used,"* and he never placed those limits. In fact he says, *"Why only standing only 4 hours?"*

1 *C'mon, be realistic. I stand 8-10, so they must be starting off with 11.* "

5 Then he contradicts himself. He goes on to state that the techniques were only intended for use against one individual, Muhammed al-Qahtani. *"Any proposals to use these methods on others would have to come back up the chain of command for review."* This seems clearly to be an ex post facto rationalization, and if I could say so, with respect, a bald faced untruth. It is a lie.
10 Because as we saw, these techniques were applied to the prosecution witnesses.

15 And even as against this one individual, Muhammed al-Qahtani – they only authorised it for Muhammed al-Qahtani, because he is a *"high value detainee"* – even as against this one individual, in the face of the overwhelming evidence of torture, Rumsfeld says (Memoir: p. 583) [Bundle S: 230 at p. 234],

20 *"Some two and half years later, I learned what had happened to Qahtani during his interrogation. I was surprised and troubled. Some of what took place sounded to me as if the interrogation plan may have gone beyond the techniques I had approved. They may not have been in keeping with the intent of my January 2002 order that all detainees were to be treated humanely."*
25

30 So this is his defence. Credible? I leave it to Your Honours to decide.

35 But it contradicts other credible evidence. Now there is a declaration filed by Gitanjali, who was the lawyer, on January 8, 2003, [Bundle S: 283]. Now Gitanjali represents Qahtani, and he made that declaration in support of Muhammed al-Qahtani. And this is what he says, this is a sworn statement,

40 *"Rumsfeld called General James T. Hill, Commander of the Southern Command, to speak about al Qahtani's interrogation and its progress. General Hill, in turn, spoke with Major General Miller, and remembers Miller, saying that "[w]e think we're right on the verge of making a breakthrough." Major General Miller recommended that the harsh interrogation*

techniques continue and General Hill provided this information to Secretary Rumsfeld."

That's your first corroboration.

Then, a December 20, 2005 Army Inspector General Report concerning Mr. al-Qahtani's interrogation, the Schmidt Report, also describes the involvement of Secretary Rumsfeld and Major General Miller in Mr. al-Qahtani's interrogation during late 2002 and early 2003 [Bundle S: 283 at 288]. The Schmidt Report contains a sworn statement by Lieutenant General (Lt. Gen.) Randall M. Schmidt that Secretary Rumsfeld was "personally involved" in the interrogation of Mr. al-Qahtani and spoke "weekly" with Major General Miller during the interrogations.

So Rumsfeld knew, or should have known, of the abuses and torture at the various centres. In fact he was personally warned by Human Rights Watch 2005 at page 43 [Bundle 3B: 1665] gives evidence of that fact. His department was also repeatedly warned of the abuse of detainees by the International Committee of the Red Cross [Bundle 3B: 1666].

In any event, the whole world knew about it. There was also substantial public information of the abuses – it was in the public domain.

And so, by his failure to intervene, aside from withdrawing, he withdrew his blanket approval for certain methods at Guantanamo in February 2003, as earlier noted; it became predictable that these acts would be committed. They were in fact carried out. Instructions were acted upon. So responsibility must attach not just to those who implement the action, but also those who issue the actions, and the actors involved would be responsible – individually as well as collectively. So the subordinate as well. This is because, and we quote the case from the International Tribunal, *Prosecutor v Blaskic*, the order was given "with the awareness of the substantial likelihood that a crime will be committed in the execution of that order."

1 Further evidence is provided of the direct involvement of these
top echelons in Washington, if you look at the sequence of
events – I've set it out at my page 58(o).

5 The person who ran Guantanamo at that time and ran the
military interrogations was Major General Michael Dunlavey.
He confirms that there was a direct link between the
formulation of the 18 techniques at Guantanamo and
10 Washington. And he is quoted as saying that during the whole
period, these techniques were being discussed and
formulated, Rumsfeld was *"directly and regularly involved."*
And this is the head of military interrogations at Guantanamo.
What clearer evidence can you have?

15 Rumsfeld, is he responsible then? In his memoir he admits
that these events, the torture exposure at Abu Ghraib, for
example, all those that were shown in the video yesterday, he
says, *"occurred on my watch. As Secretary of Defense I am
accountable for them. I take full responsibility."*

20 But till today, where is the responsibility that is taken? This is
empty rhetoric to rationalise what cannot be rationalised. To
reconcile the irreconcilable. And this is the same testimony
that he gave to the Armed Services Committee which I've set
25 out in my Bundle.

After January 15, 2003 Rumsfeld acted to restore some
semblance of lawfulness. So what he did? He got a working
group going and he said, *"Please look at these interrogation
30 techniques,"* and this group published its report and they
proposed 35 interrogation techniques, and two weeks later,
Rumsfeld approved 24 of them.

35 But again, the report is based on a flawed Office of Legal
Counsel memorandum of Yoo and Delabunty that Geneva
Conventions don't apply, and Torture Convention says there's
a threshold level. So, the fruit of the poisoned tree is poison.
What justification do you want? Whom do you want to feed
40 this fruit to? There will be poison. But, even then, even in the
light of pressure he withdrew, the fundamental rules did not
change.

The logic of the memos from the AG's office, the Torture Memos, Bybee and Yoo's, the 7th and 8th accused, and another Yoo memo of March 2003, they remained in effect for over a year until the Abu Ghraib caused them to be suspended. Congress did not legislate to prohibit such treatment of Guantanamo detainees until December 2005 when all Department of Defense interrogations were required to comply with FM 34-52.

This is Defence [Department] interrogation, but the CIA has no such limitation – must not forget. So they are acting in concert. We heard the testimony – sometimes they were civilians, sometimes they were wearing FBI caps, sometimes they were in military uniform.

Although the Geneva rules were being treated as applicable because of the nature of the conflict in Iraq, *“that did not stop General Sanchez from authorizing techniques that were not listed in FM 34-52, that plainly violated Geneva and that were included in the Haynes memo, including environmental manipulation (temperature adjustment), the presence of military dogs, sleep management,”* and so on.

And we have the Schlesinger Report of August 2004 that was set up to look into the abuses. Even they concluded that the entire Pentagon chain of command, including Rumsfeld, was responsible for the torture and abuses at Abu Ghraib.

We also have the Report of the Commission on Human Rights – interrogation techniques authorized by the Department of Defense, particularly if used simultaneously, amounted to degrading treatment in violation of Article 7 of the International Covenant on Civil and Political Rights (ICCPR) as well as a violation of the Torture Convention.

Then we have the Taguba Investigation set up by Coalition Forces Land Component Command. And they described the infliction on detainees at Abu Ghraib as *“systemic.”* So *it was not an occasional act that is carried out by an over-enthusiastic officer.* They were systemic. And we saw yesterday, those guys who were court martial-ed, they didn't know what hit them, because they are told to proceed to get

1 the information, no-holds-barred. When they act, they are then
convicted. And we saw the desperate look on their face. They
were devastated for acting in accordance with what they
thought was the authorisation.

5 Then the ICRC report, they said that the widespread "use of
ill treatment" could be considered a practice tolerated by the
coalition forces because it continued after the ICRC warned
US military and government officials. This is the International
10 Committee of the Red Cross, and they have a status in
international law. They are the only ones who are allowed,
they are given a legal status in the conventions. In fact, as was
submitted, you have to report to them of the fact that you
have detained people, and they are allowed access to the
15 prison.

And then, although the US Congress went a long way to
reinstate the international constraints, however, the
international definitions of common Article 3 have not been
20 applied.

Why?

25 In the words of Gonzales, to give the CIA "*flexibility*" in
interrogations. What is the meaning of that? The right to apply
any technique in any which way they want. This is in the
memo he has addressed to Bush which Bush never repudiate.

30 On March 8, 2008, President Bush vetoed a bill that would
have rendered illegal the use by the CIA of any of the
interrogation techniques set out in the Haynes 'torture
techniques' memo that was approved by Rumsfeld.

35 So, what are the defences? They say, of course, "*No need to
apply.*" Then they say, "There was no connect between the
techniques employed and the legal opinion justifying these
techniques." This I will explore later because this fixes lawyers
with liability. In any event, they said, "*mild techniques were
employed and these did not violate the Conventions.*"

40 We have already noted that these defences do not apply –
Hamdan v. Rumsfeld, the Human Rights Watch report ... and so,

all these techniques, there is no basis. Rumsfeld approved the
"secret access programme," I note that in my page 61. 1

On the basis of the report by the Working Group, he relaxed
 the definition of 'torture' and at page 62, I make it clear that 5
 Rumsfeld established the 'aggressive' torture techniques
 programme, authorised these techniques, created an
 environment that promoted torture and inhumane acts by
 sending an unequivocal signal demanding 'more actionable'
 intelligence, and failed to prevent or punish acts of torture 10
 and other violations.

It's very strange. You know what Rumsfeld said Hamdan said,
 in his book, *Known and Unknown*: He found the ruling of his
 own Supreme Court that Geneva Conventions applied, he 15
 said, *"This argument is very strange and very novel reasoning."*

And then when *Boumediene v Bush*, President Bush set up
 Military Commissions Act to counteract the effect of Hamdan
 because Hamdan had invalidated military commissions 20
 system, and the Supreme Court in *Boumediene v Bush* said,
"You can't do that," and they rolled back much of that
 amendment, he also said that he does not agree with the
 Supreme Court decision, he said, *"This is unacceptable decision,"*
 or words to that effect. He's unhappy with that decision. 25

So we say, on the sum totality of this evidence, we have shown
 beyond reasonable doubt that Rumsfeld should be convicted
 as charged. 30

Then we come to **Richard Bruce Cheney**. Very short one on
 that. He was the Vice-President. He knew everything that was
 going on. And Lawrence Wilkerson, the Chief of Staff of Colin
 Powell, the then Secretary of State has written, 35

*"There is enough evidence for a soldier of long service, someone
 like me with 31 years in the Army to know that what started
 with John Yoo, David Addington, Alberto Gonzales, William
 Haynes at the Pentagon, and several others, all under the
 watchful and willing eye of the Vice President, went down 40
 through the Secretary of Defense to the commanders in the*

1 *field, and created two separate pressures that resulted in the*
 violation of longstanding practice and law."

5 Cheney also played a key role in opposing the amendment
 proposed by Senator John McCain to pass an amendment to
 the 2006 National Defense Authorisation Bill to prohibit "*cruel,*
 inhuman and degrading" treatment of detainees in US military
 custody.

10 If Your Honours will allow, it is only a short 2-3 minutes video
 of Dick Cheney responding to this particular point. Cameras
 roll.

 This is the problem, modern technology ...

15 [video of Dick Cheney]

 Woman's voice: ... Dick Cheney's 576-page, "In My Time: A
 Personal and Political Memoir." Cheney's
20 begun a publicity blitz to promote his new book
 with a string of TV appearances scheduled on
 FOX News Channel, as well as C-SPAN and
 the major networks. He appears on the 'Today
 Show' this morning, this is an excerpt of of his
25 pre-taped interview with Cheney that aired last
 night on 'NBC News: Dateline'.

 Interviewer: Should we still be waterboarding terror
 suspects?

30 Cheney: I would strongly support using it again if we
 had a high-value detainee if that was the only
 way we could get him to talk.

35 Interviewer: People call it torture. You think it should still
 be a tool?

 Cheney: Yes.

40 Interviewer: Secret prisons?

 Cheney: Yes.

- Interviewer: Wire-tapping? 1
- Cheney: Well, with the right approval.
- Interviewer: You say it is one of the things you are proudest of and you would do it again in a heartbeat. 5
- Cheney: It was controversial at the time. It was the right thing to do. 10
- Interviewer: No apologies?
- Cheney: No apologies.
- Woman's voice: That was Dick Cheney speaking to Janey Dangle on NBC Dateline. Cheney says his memoir is loaded with ... 15
- [End of video – Dick Cheney] 20
- Gurdial Singh Nijar:**
- Next trial, we'll do it better. So here you have it. *"Yes, yes, yes, no apologies, I will do it again."* This is the clearest admission.
- And this talks about high-security detainees. Moazzam Begg was put in Camp X as a *"high value detainee"*. And the other witness that we had had the words put across his forehead, *"Big Fish,"* meaning high-value detainee. These were the people they called high-value detainees, members of the panel. And they were never charged. In fact they were released. So this is the bluff that we have to call. This is the clearest admission of guilt. They didn't care a damn. 25 30
- This concludes with regards to the liability Cheney and we pray that he be convicted as charged. 35
- ...
- Registrar Musa Ismail:**
- All rise. 40

09 May 2012 – Session 2

Gurdial Singh Nijar:

May it please Your Honours, I am now at the final part of my submission. This is with regard to liability of lawyers: the lawyer to President Bush, the Vice President, lawyer to the Secretary of Defence, the two lawyers from the Attorney General's chambers.

I concede that this is the more difficult part of the submission, and I invite Your Honours to page 63 of my submission. So, I have discussed this morning that there was advice given by these lawyers, the advise to be effect that :-

- (a) Geneva Conventions did not apply
- (b) there was in any event no 'torture' within the meaning of the Torture Convention
- (c) certain interrogation techniques were permissible

Advise were also given that could be no prosecution for violating, for example, the Federal Court Statutes because anyone violating that could avail themselves of the defence of necessity and self defence. So, this was the advise that was given.

To reiterate, there are 3 memos by the Attorney General's chambers by Jay Bybee, Assistant Attorney General; by John Yoo, Deputy Assistant Attorney General; there was also a memorandum by William Haynes, who was Rumsfeld's lawyer, he approved the enhanced interrogation techniques which then Rumsfeld approved by the so-called Torture Memo of December 2, 2002; and Vice-President Cheney's lawyer, David Addington, he contributed to the memo by Jay Bybee and John Yoo that gave this advise. He also was privy to and approved the 18 interrogation techniques. He's also reported to have approved waterboarding. He described it as a "dunk in the water," and a 'no-brainer,' if it could save lives.

So, this was the advice that given, and the memorandum make it clear.

Now the first point I want to make is: This advise was clearly flawed – it was wrong in law and manifestly so. And who says so? 1

First, the Supreme Court in *Hamdan v. Rumsfeld*, where Supreme Court judge, Arthur Kennedy J and 3 other judges made clear, '(V)iolations of Common Article 3 are considered "war crimes".' This is the Supreme Court saying that. Completely contrary to the advise given. 5

Who else said that? 10

The lawyer to the Navy, Albert Mora, he was featured on the video yesterday, he wrote a memorandum to the Inspector General, Department of the Navy, and that is in my Bundle, indicated page 64(b). What did he say? He described the memorandum of John Yoo and Delahunty as a piece of "flawed legal analysis". 15

Who else says that? 20

This view has been echoed by several respected legal commentators and academics. The memorandum has been described, for example, as "grossly inaccurate" and based on a "flawed analysis" – Katheen Clark, (2005), p. 455 at pp. 458 – 25 463 [Bundle: 3B: 1100 at 1103- 1108].

Today's Legal Adviser to the US Department of State, Harold Koh, who was then Dean of Yale Law School, of this memorandum, this is what he wrote, this from the Columbian Journal of Transnational Law, 43 Colum. J. Transnat'l L. 641, 654, 30

"In sum, the August 1, 2002 Bybee Opinion is a stain upon our law and our national reputation. A legal opinion that is so lacking in historical context that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty." 35 40

1 So there you have it. From a wide array of officials, ex-officials, commentators, and people who have an acknowledged expertise in the subject that we are talking about.

5 So the advice was flawed. That's the first point. Very clearly so.

10 Was there a connection between the action taken and the legal advice? That is the next point. And I raised this because the lawyers have suggested that, "Okay, we gave an opinion to justify some of these techniques, but there is no connection between the action that followed and the advice we gave," and to quote them, they said, "We were merely exploring 'the outer limits' of the legal landscape." That's all. Exploratory in nature.

15 *The prosecution's submission is that the lawyers knew full well that their advice was being sought to be acted on, and they know that it was in fact acted on, and this paved the way for the violations of international law.* We have a very heavy burden, beyond reasonable doubt.

20 First is the binding nature of the advice. Let us look at the legal framework within which this advice was given. This was given by the Office of the Legal Counsel. I looked at their web page, and I reproduce what their web page says,

25 "All Executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel **for form and legality**, as are various other matters that require the President's formal approval." [Bundle S: 380]

30 So they do a legal check to make sure that whatever reviewed by them conforms with the law. And if you go on, more specifically,

35 "the function of providing authoritative legal advice to the President and all the Executive Branch agencies. **OLC opinions are binding on the Executive Branch.**"

40 What is this, "exploring the outer limit of the legal landscape"? Who are these lawyers fooling? Who are they trying to hoodwink, when their own mandate says so explicitly what

is the effect of the advice they give. It is not exploratory. Binding. 1

Next point: Did they, Bush, Cheney and Rumsfeld, act on this advice? That is the next thing the prosecution have to prove. We submit that they did rely upon and act in accordance with the advice of the lawyers. And who says that? **President Bush** says that. He nails the lie that there was no connect between the techniques employed and the legal opinions justifying these techniques, and I have a quote from his own mouth, 5 10

‘Years later many lawmakers became fierce critics. They charged that Americans had committed unlawful torture. That was not true. I had asked the most senior legal officers in the US government to review the interrogation methods and they had assured me that they did not constitute torture. To suggest that our intelligence personnel violated the law by following the legal guidance they received is insulting and wrong.’ (at p. 171) [Bundle: 3A: 213]. 15

There was this connect – a direct connect. In fact, his Executive Order of 7 February 2002 makes clear that in making the order excluding the prisoners from the Geneva Conventions he was *‘relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002’* (para 2 of memo 11) [Bundle 3A: 533]. 20 25

So this is it. He’s relying on it. The memo says that. So what is this “exploring the outer limits of the legal landscape”? Who is this intended to hoodwink? 30

And Rumsfeld, at page 67, issued a memorandum for Chairman of the Joint Chiefs of Staff dated 19 January 2002 [Bundle 3A: 491]. And he approved the ‘advice’ given to him by legal counsel John Yoo and Robert Delabunty. So they gave advice by a memorandum dated 9 January 2002 that the CIA was free to ignore Geneva Conventions because they did not apply to suspected Al-Qaeda and Taliban detainees. And that was the advice given, he wrote on it, *“Approved,”* in his own handwriting. And the legal counsel says, *“No no no no. That is* 35 40

1 just exploring the outer legal landscape."Who are they trying to
hoodwink?

5 And if that is not enough to show the connect between the
Torture Memos and techniques, to link it with the lawyers,
Rumsfeld also states (Memoir: 580) [Bundle S: 230, at p.232]
that the interrogation methods he had approved (in the now
infamous Dec 2 2002 Action Memo) were determined by
10 Pentagon lawyers to be both legal and humane. His
rationalization now for their universal condemnation is: "Any
technique that is legal and humane on its own could conceivably be
applied in ways that are not legal and not humane if, for example, it
is done repeatedly, over long periods of time or used in inappropriate
combination with other techniques." [Bundle S: 230, at p. 233].

15 And this is the most important link: Rumsfeld states that
"Administration lawyers **fully vetted and approved the CIA's
program, giving them the green light** to proceed"; Memoir: 586.
[Bundle S: 230, at p. 235]. And we know, that dastardly CIA
20 programme that was applied, where they stripped human
beings of any sense of decency and applied the most heinous,
cruel, and barbaric methods to extract confessions. And that
they approved the interrogation techniques – up to and
including waterboarding; at 583. [Bundle S: 230, at p. 234].

25 It was not just Bush, Cheney and Rumsfeld who relied on
their advice. There was a whole range of critical actors who
were involved in one way or another in applying these
techniques, or being in charge of the application of these
30 techniques.

First, the CIA director, George Tenet. The former CIA Director,
Tenet, in his memoirs recounts that the CIA had to wait until
legal opinion was given before they could embark on
35 aggressive interrogation techniques. In his words,

40 "We wondered what we could legitimately do to get that information.
Despite what Hollywood might have you believe, **in situations like
this you don't call in the tough guys; you call in the lawyers.** It
took until August to get clear guidance on what Agency officers
could **legally** do." – p. 241 [Bundle: 1015, at 1018].

The 'clear guidance' came in the August 1, 2002 memos by Counsel of the AG's office – Bybee and John Yoo and which were also relied upon in Rumsfeld's lawyer's Haynes memo and in the opinion that the CIA had asked for on specific techniques. There you have it. Words from the former CIA director. 1 5

Maybe that's not enough.

Then we look at the person in charge of Guantanamo, Diane Beaver. The document issued by Rumsfeld listing the 18 techniques and providing legal advice as to its legally permissible use was signed by Diane Beaver. She was in charge of Guantanamo. *The lawyers for Rumsfeld, Bush, Cheney and the CIA visited Guantanamo before the list of the techniques was compiled.* Beaver states in an interview that the message they got from these lawyers acting for the highest officers of the land, was that they should do "whatever (was) needed to be done", meaning a green light from the very top. This is quoted in Philippe Sands (2008), p. 63 - 64 [Bundle 3A: 110-111]. Beaver acknowledges that there was never any question in her mind that Washington was closely involved (ibid. at p. 63). 10 15 20

What could be higher than Bush, Rumsfeld, Cheney? 25

We go on one step further. The visit by the lawyers to Guantanamo. The lawyers came to Guantanamo for an orientation visit, **well before** the list of techniques was sent to Washington. They talked to intelligence officials and even watched some interrogations. Sands: 63- 64 [Bundle 3A: 110-111] 30

Their contention that their advice was merely to "explore the outer limits of the legal landscape" must be rejected *in limine*. They kick-started all the acts that violated international law. 35

These techniques in Guantanamo 'migrated' to Iraq, as the testimonies of the several complainants in this case bears out so lucidly. Almost identical, systemic, mode of operation: the hooding, the hanging on the wall, solitary confinement, 40

1 application of electrocution, nudity, the abuse, the humiliation,
the denial to Courts – all cumulative, all at the same time.

5 The report by the former Defense Secretary James Schlesinger
attests to this fact. He states that the *“augmented techniques for
Guantanamo migrated to Afghanistan and Iraq where they were
neither limited nor safeguarded”* (The Schlesinger Report in the
Torture Papers p. 908 at pp. 914-915 and 941).

10 So there you have it. Advice connected to the action, as
admitted, acted upon, to their knowledge. But the next
question that arises: Are those who give legal advice liable?
That is the question.

15 Let’s listen to what the Nuremberg trial said, in the Altstotter
case. Altstotter was Chief of the Civil Law and Procedure
Division of the Ministry of Justice: *ibid* p. 26 [Bundle 1A: 719],
where he had drafted laws,

20 *“legal advisers who prepare legal advice that is so erroneous as to
give rise to an international crime are themselves subject to the rules
of international criminality”*.

25 As crystal clear a pronouncement can be. The Nuremberg
Tribunal highlighted the fact that as a lawyer he knew of the
crimes that were being committed and found him guilty of
giving his name as *“a jurist of note and so helped to cloak the
shameful deeds.”*: at p. 72 [Bundle 1A: 765]. *“The cloak of the
assassin was concealed beneath the robe of the jurist”*: p. 741 [Bundle
30 1A: 743].

35 Notably, sixteen lawyers were charged in Nuremberg with
war crimes and crimes against humanity arising out of Hitler’s
war. Of these, twelve were convicted and 1 committed suicide
before the verdict. Only four were acquitted.

40 Then the question arises: What kind of criminal responsibility
will they hold? Philippe Sands asked a Judge experienced in
international criminal cases and a Prosecutor of war crimes,
who held Philippe Sands not to disclose their names: Does a
delinquent lawyer share the same responsibility as the rogue
interrogator? The answer,

"If the legal advices they wrote had opened the door to abuse or even torture and the use of techniques of interrogation on specific individuals, then in theory the responsibility would go back to the author of the legal advice on which the General Counsel and the decision-maker had relied." (Philippe Sands, at p. 205) [Bundle 3A: 118].

Now this is a statement made by a large number of lawyers from the most respected campuses of America. Lawyers from some of the most respected institutions reviewed this. And this is what they say, which they addressed to Bush, Cheney, Rumsfeld, Attorney-General then, John Ashcroft, as well as to members of Congress. This is a statement on the memoranda prepared by the White House, Department of Justice, Department of Defence *"concerning the war powers of the President, torture, the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention)... and related matters."* And they refer specifically to the administration's memoranda which we have been talking about, dated January 9, 2002, January 25, August 1, April 4. And this is what they say,

"These memoranda ignore and misinterpret the U.S. Constitution and laws, international treaties and rules of international law. The lawyers who approved and signed this memoranda have not met their high obligation to defend the Constitution."

And they go on to chastise the lawyers, as well as the memoranda that were prepared. They say the memoranda claimed a power for the President as Commander-in-Chief to ignore law, treaties, and the Constitution regarding the treatment of prisoners. If you look at the second page, the last point: These memoranda contrived defences by distorting definitions of necessity, self-defence, and superior orders in order to avoid independent responsibility for actions that would violate the US Army Field Manual and relevant statutory and case law. These memoranda and other like them seek to circumvent long established and universally acknowledged principles of law and common decency. The memoranda approved practices that the United States itself condemns in its annual human rights report. No matter how

1 the memoranda seeks to redefine it, torture remains torture.
The belated repudiation of the August 2002 memoranda which
has been signed by Bybee, then Assistant Attorney-General
Office of Legal Counsel, now a Federal Judge (he got
5 rewarded), is welcome. But the repudiation does not undo
the abuses that these memoranda may have sanctioned or
encouraged during the nearly 2 years that it was in effect.

10 Tell that to Moazzam Begg. He repudiated it later, after the
implementation of the memoranda. Tell that to Moazzam
Begg, tell that to Jameelah, tell that to Abbas Abid, Rhuhel,
and Abbas Shahlal.

15 The subsequent repudiation coming after public outcry
confirms its original lawless character. Moreover, the claim
that the President's authority as Commander-in-Chief allows
him to ignore laws, treaties, and the Constitution relevant to
human rights and therefore to shield those acting on his
authority who violate domestic and international law by their
20 interrogation methods and other behaviour directly
contradicts several major Supreme Court decisions, numerous
statutes passed by Congress and signed by the President, and
specific provisions of the Constitution itself.

25 One of the surprising features of these legal memoranda is
their failure to acknowledge the numerous sources of law that
contradicts their own position. The unprecedented and under-
analysed claim that the Executive branch is a law unto itself
is incompatible with the rule of law and the principle that no
30 one is above the law.

The lawyers who prepared and approved these memoranda
have failed to meet their professional obligations. A lawyer
has a duty both to ask his or her client what that client wants
to do and assist the client in accomplishing his or her lawful
objectives. But the lawyer has a simultaneous duty as an officer
of the Court and as a citizen to uphold the law. Enforcement
of all our laws depends on lawyers telling clients not only
what they can do, but also what they cannot do. That duty
35 binds all lawyers, especially lawyers in the government
service. Their ultimate client is not the President or the CIA,
or any other department of government, but the American
40

people. When representing all Americans, government lawyers must adhere to the Constitution and the rule of law. In fact, government lawyers take the following oath, 1

"I, so and so, do solemnly swear/affirm that I will support and defend the Constitution of the United States." 5

Conscientious leaders of the Department of Justice and lawyers in other governmental agencies have always striven to meet that standard. But some of them currently occupying senior legal positions in this administration, in this instance, have abandoned this standard. They have counselled individuals to ignore the law, and offer arguments to minimise their exposure ... liability for doing so. There could never be a more serious, well-considered indictment of lawyers who bend the law in their client's favour than this. 10 15

And then we have David Cole, who makes very clear, and I've quoted his opinion, 20

"When considered as a whole, the memos reveal a sustained effort by the OLC lawyers to rationalize a predetermined and illegal result" [Bundle S: 384, at p. 385]

Now we come to the question of their liability. The case of *Prosecutor v. Tadic*, which is a decision of the Appeals Chamber, International Criminal Tribunal for ex-Yugoslavia (ICTY). So all that they did, we submit, makes them liable for a joint criminal enterprise. And this Tribunal made clear that liability attaches for joint criminal enterprise. 25 30

Participation in the joint criminal enterprise is a form of "commission" under Article 7(1) of the ICTY Statute, even though such criminal complicity is not explicitly provided for in the Statute. 35

Now the plan need not have been previously arranged or formulated. *"The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise."* 40
That is the decision.

1 And we submit that the cumulative evidence establishes, we
submit, a joint enterprise to carry out acts that are war crimes.
There was a common purpose of the actors. This is established
by the written memos, the orders and directives and the
5 actions following upon their issuance. The strands weave into
a whole fabric of war crimes.

10 The decision-makers at the highest levels – President Bush,
Vice-President Cheney, Secretary of Defense Rumsfeld – aided
and abetted by the lawyers and the other commanders and
CIA officials - all acted in concert. Rumsfeld wanted more
aggressive techniques, the lawyers advised on how this could
be accomplished and provided legal arguments to circumvent
15 the law, Bush approved, and the techniques were transmitted
and applied right down the chain of command. The torture
was systematically applied and became an accepted norm.

20 The 5 elements which we say we have proved which the trial
chamber in Prosecutor v Krnojeac, has made clear,

25 *"A joint criminal enterprise exists where there is an
understanding or arrangement amounting to an agreement
between two or more persons that they will commit a crime.
The understanding or arrangement need not be express, and
its existence may be inferred from all the circumstances.
It need not have been reached at any time before the crime
is committed. The circumstances in which two or more
persons are participating together in the commission of a
particular crime may themselves establish an unspoken
30 understanding or arrangement amounting to an agreement
formed between them then and there to commit a crime."*

35 There you have it. These people were acting in concert, all
supplementing each other's actions. It was a dance of torture.
So all actors will be responsible because once an order is made
the individual who through his orders secures the commission
of the crime is personally liable as a perpetrator because he is
using a subordinate down the chain to commit the crime. This
is because the order was given *"with the awareness of the
substantial likelihood that a crime will be committed in the execution
40 of that order"*: Prosecutor v. Blaskic, Case No. IT-95-14-A.
Judgment, 29 July 2004, para 42 [Bundle 1B: 1053, 1072].

Finally, we have the words of Jordan J. Paust, a former U.S. Army JAG officer and member of the faculty of the Judge Advocate General's School who has written a book, 'Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror'. And he says,

'Far from providing real cover, the newly disclosed smoking gun provides further evidence of serial criminality and demonstrates beyond reasonable doubt why a memo writer is reasonably accused of complicity whether or not he knew that certain conduct would be "torture."'

President Bush seems to make a plea on their behalf. He says in his memoirs,

"Legal officials in my administration did their best to resolve complex issues in a time of extraordinary danger to our country. Their successors are entitled to disagree with their conclusions. But criminalizing differences of legal opinion would set a terrible precedent for our democracy" (atp. 180) [Bundle 3A: 216].

So he's saying, "People have differences of opinion. Be fair."

What is this?

This is the defence of necessity – "security of the nation". It echoes a similar defence raised at Nuremberg – unsuccessfully, by Josef Alstotter ("security reasons"). They said the race is under threat of impurity. The German nation is under threat of attack, after the 1st World War. And this you have, the modern day Hitler, raising, resurrecting, reasons which has long since been declared as being antithetical to civilised conduct.

To conclude, this we submit that these senior legal luminaries knowingly lent their juristic and forensic legal skills to advance the commission of war crimes. They should have known better than to have garbed these crimes with the cloak of legality. They cannot avoid liability for war crimes for acts that were perpetrated on the strength of their advice.

1 Let me conclude.

2 We have presented evidence which probably tests your beliefs
3 – that such acts could be perpetrated in this day and age by
4 leaders of a nation founded on hard-fought liberty. The nature
5 and quality of our evidence, it might be suggested that we
6 don't have those direct evidence from all these officers, we
7 quoted Tenet, Dunleavy. You can say, "*You didn't bring them
8 here.*"

9 Well, this has been an extremely difficult trial to prepare. To
10 collect that kind of evidence, in a people's tribunal, where we
11 are charging the most powerful, or those who think they are
12 the most powerful, or were the most powerful people,
13 ostensibly the most powerful nation in the world; but what
14 we have tried to do, we have extracted documents, official
15 documents, we have looked at the memorandums – some are
16 still closed to the public – we have collected all the de-classified
17 documents, we have looked at commentaries by key players,
18 many of them we tried to get public officials, we have looked
19 at commentaries written by those who know better than us
20 mere mortals on the prosecution team, we have trawled as
21 much as we can, and we have come up with this evidence.

22 And we submit, and we would like, Your Honours, the
23 Tribunal, to hold that we have proved beyond reasonable
24 doubt that all the accused persons were instrumental in
25 inflicting torture, cruel, inhuman, and degrading treatment
26 that violated customary international law on torture, that
27 violated the Torture Convention, that violated Geneva
28 Convention III and IV and the Common Articles. These are
29 war crimes.

30 The lawyers, and even the rulers, subverted the system of
31 international rules that should protect all detainees. In fact, it
32 is a system that the US did so much to put in place after the
33 Nazi atrocities in World War II. The charge against the accused
34 here is very similar to the charge against the Nazi war
35 criminals who were convicted at the Nuremberg trials. And
36 this is what they were charged with: "*the charge of conscious
37 participation in a nation-wide governmentally organized system of
38 cruelty and injustice, in violation of the laws of war and humanity,*

and perpetrated in the name of law by .. authority": Alstotter, p. 1
 49 [Bundle 1A: 742].

So exactly the same position here. Not one iota of difference. 5
 Conscious participation, nation-wide governmentally
 organized system of cruelty and injustice, violation of laws of
 war and humanity – here they went one step further, and in
 fact declared themselves isolated, exempted from applying
 international law – and they perpetrated in the name of the
 law, yes, they used these lawyers, in the name of the law, by 10
 authority. Exactly the same as in Alstotter case, Nuremberg,
 sentenced to death.

Why so? After 9/11, all the pronouncements from on high,
 evidence a conscious decision to set aside international rules 15
 constraining such treatment. A combination of factors account
 for this: fear, ideology and an almost visceral disdain for
 international rules and norms.

It was the same with Hitler and Nazi Germany. They also 20
 raised the spectre of threats to the German race and nation.
 Here the prime accused used the cover of 9/11 to instill fear
 and subvert the American conscience. And in the name of
 curbing terrorism, terrorise the world through wars, and in
 the present case, torture, and may I add, continue to do so. 25
 This is in utter defiance of the fundamental truth, in fact,
 articulated long ago – 18th century by a former British Prime
 Minister, William Pitt, he says of the defence of necessity,

"Necessity is the plea for every infringement of human freedom. It 30
is the human of tyrants. It is the creed of slaves."

The Prosecution wishes to stress that we do not exonerate the
 several other actors who are just as much to blame: CIA 35
 Director, George Tenet and his legal counsel – John Rizzo for
 the crimes; nor indeed others, such as those who were leading
 lights in the Southern Command that had jurisdiction over
 Guantanamo, especially its commanding officers, Major
 General Michael Dunlavey and his successor, Major General
 Geoffrey Miller. There were others too, for example the AG 40
 himself at the time, John Ashcroft. As well as Paul Wolfowitz,

1 the Deputy Secretary of Defense, who by 2 memorandums
authorized conduct that violates Geneva III (see Table 1).

5 This is explicable. We would like the members of the panel to
understand, because we wish to hold to account those who
would seek to use their lofty position to insulate themselves
from prosecution – those who soil not their own hands, but
abusively use lesser-ranked personages as pawns in their
10 international war criminal marks game. We want to reach the
planner, the designer, the incitors, the leaders, and their ring
of legal advisors who have crafted and shaped the evil. And
we want to ring in this message, *“Be you ever so mighty that
you cannot be reached – you CAN be reached.”*

15 And so, however we have chosen to charge the key players –
against them, we say there is overwhelming evidence, and
they bear a direct responsibility for war crimes. This is indeed
a historic trial. This is one of the first few trials, people’s
tribunal which had proceeded with *scrupulous adherence to*
20 *the rules of fair-play and justice*. This role finally now falls
on you, members of the panel, to fulfil your historic function,
and so I conclude by saying that the prayers we ask for are
that all the accused be found guilty as charged, and convicted.
We also request that this Tribunal recommend to the War
25 Crimes Commission,

- 30 a) To submit the Tribunal’s findings of conviction
and a record of these proceedings to the Chief
Prosecutor of the International Criminal Court; as
well as the UN and the Security Council – under
Article 31 of the Charter of the KL War Crimes
Commission for their further action; and
- 35 b) To enter the names of all the accused persons
convicted as war criminals in the Commission’s
Register of War criminals and publicized
accordingly – under Article 32 of the Charter of
the KL War Crimes Commission.
- 40 c) We also pray for the conviction to be given the
widest international publicity, as these are
universal crimes for which there is a responsibility

upon nations to institute prosecutions if any of these accused may enter their jurisdiction. 1

Your Honours, I thank you very much for the patience you have afforded us all, and in particular the prosecution. I thank you very much, and I believe Professor Boyle has a few words to say to conclude the prosecution's case. Thank you. 5

Francis Boyle:

Your honour, may it please the Court, yesterday I had cited Robert Jackson J, the Chief Prosecutor of the Nuremberg war crimes trial, and his exact words were, 10

"If certain acts and violations of treaties are crimes, they are crimes whether the United States does them, or whether the Germany does them. We are not prepared to lay down a rule of criminal conduct against others which we will not be willing to have invoked against us." 15

Yesterday in my opening statement, I had gone through the provisions of the Nuremberg Charter, Article 6, that have been violated by the Defendants here. I will not repeat that part of it at this point in time except to say that this Nuremberg law that I mentioned yesterday, the Nuremberg Charter and the judgment, were later incorporated by the United States government itself in Department of the Army Field Manual 27-10: The Law of Land Warfare, which is still valid and binding today on United States military and government officials. This includes President Bush in his capacity as Commander-in-Chief of US Armed Forces under the United States Constitution, Vice President Cheney who steps in if President Bush is not available, Secretary of Defence Rumsfeld this is Department of the Army Field Manual, as well as the lawyers involved. 20 25 30

So, all I am doing here is taking their own Field Manual that applies to them and that they know about, and applying to that body of law here today. Indeed, this Field Manual was drafted by my teacher, the laws of war at Harvard law school, Professor Richard Baxter, later judge of the International Court of Justice in the Hague; and at the time he was considered to be the world's leading expert on the laws of war and he drafted 35 40

1 this for the Pentagon. This is the exact same copy I have used
to study with Professor Baxter and have used repeatedly in
US Court proceedings, including US Military court martial,
as recently as the court martial of Lt. Watada. The United
5 States Military court martial fully accepts this as valid on
United States government officials.

What does it tell us that is relevant here?

10 Paragraph 498 – Crimes under International Law: *“Any person,
whether a member of the armed forces or a civilian who commits an
act which constitutes a crime under international law is responsible
therefore and liable to punishment.”*

15 So any person, that means President Bush, the Commander-
in-Chief of Armed Forces; Vice President Cheney, number
two; Secretary of Defence Rumsfeld; and, the lawyers who
are civilians – any person or a civilian. So, this manual clearly
applies to these lawyers who were giving advice in a military
20 context.

Then the crimes were – crimes against peace, which we dealt
with in the last charge, I won’t repeat that here; crimes against
humanity, and war crimes. Here Professor Baxter incorporated
25 the Nuremberg crimes themselves directly into the US Army
Field Manual and applied them to all US government officials
in the chain of command, and including the CIA, any private
contractors they might had, as well as the lawyers.

30 Now what does it say yesterday? I have mentioned conspiracy
for the lawyers. Paragraph 500 – Conspiracy, incitement,
attempts and complicity. Conspiracy, direct incitement and
intent to commit, as well as complicity, in the commission of
crimes against peace, crimes against humanity, and war crimes
35 are punishable. So certainly, the lawyers did not actually go
out and tortured people themselves and they were not in the
chain of command, as were Bush, Cheney, and Rumsfeld. But
they were part of a conspiracy to violate the Geneva
Conventions and the Convention Against Torture; and I have
40 given you now two articles by Professor Paust, one of
America’s leading experts on the laws of war who was a
lawyer working for the Pentagon during the Vietnam war

investigating war crime and substantiating the proposition that these lawyers were part of a conspiracy to violate the Geneva Conventions and the Convention Against Torture.

Indeed, what really happened here with these lawyers' memoranda was an attempt by the lawyers to concoct a bogus defence of "*advice of counsel*," namely, they knew that their principles, Bush, Cheney, Rumsfeld, Tenet and others fully intended to engage in torture. And therefore, in a vain effort to protect their principles, they created these Memoranda for the express purpose of enabling their Principals to say, "*Well, my lawyers said I could do it, so I did it, and therefore I'm not guilty of anything.*"

And this is exactly what we have seen some of these principles tried to argue or do. It's very similar to the Nuremberg defence at Nuremberg, where the defendants said, "*Well, I was just carrying out orders that went all up the chain of command and at the top of the chain command was Hitler and he was dead, so no one was guilty of anything.*" That's exactly what these lawyers tried to do: To concoct this bogus defence of "*advice of counsel*" knowing full well their Principals had ordered torture and to give them some type of plausible legal defence.

And as Professor Paust makes very clear in the two articles we gave you, this renders them part of a conspiracy to violate the Geneva Conventions and the Convention Against Torture all of which, by the way, are felonies under the United States criminal law, the US War Crime Act, and the Anti Torture Statute. And by the way, if death results as violation of these laws, it is a capital offence – not that I support the death penalty for anyone, even heinous war criminals like Bush, Blair and the rest of these people. But that gives you an idea of the gravity of these offences, even under United States domestic criminal law, not even counting international criminal law.

So the lawyers were engaged in a "*conspiracy*" and complicit in the commission of war crimes and crimes against humanity, even it is recognized by paragraph 500 of the US Army Field Manual which applied not only to people in the chain of command but also to civilians such as these lawyers. All they

1 had to do was read the Field Manual. It was there. It's an
official government document and every expert on
international law, which these gentleman said they were
supposed to be – in my field – knows full well about the
5 existence of this Field Manual and studies it in law school
exactly the same way I did. Professor Yoo went to Yale Law
School which is one of the top law schools in the country. He
knew so well about this Field Manual. I learnt at Harvard
Law School. So you cannot plead ignorance of the law here.
10 It's no excuse, in any event.

Paragraph 501, of course, deals with responsibilities of active
subordinates, which incorporates directly the Yamashita case,
that my colleague mentioned, namely for those in the chain
15 of command – commanders, whether it is civilian or military,
including President Bush, Vice President Cheney, Secretary
of Defence Rumsfeld, is responsible for the crimes committed
by his subordinates; first, if he orders them, which in this case
we have established they have, from Bush straight on down.
20 And second, if they knew or should have known that troops
or other person – “other persons” would take care of the
accounts yesterday, we heard, that people not in US military
uniforms were conducting tortures, or other persons subject
to their control are about to commit a war crime and fail to
25 take the necessary and reasonable steps to ensure compliance
with the law war or to punish violators thereof.

As I pointed out yesterday, the United States government was
the belligerent occupant of Iraq. You have my Memorandum
there in front of you establishing this, even in accordance with
the terms of US Army Field Manual 27-10. And thus the torture
that took place there, whether by the military, the CIA, or
civilian contractors, or Iraqi torturers, acting with the
knowledge of the United States government, or even the wilful
35 ignorance of the United States government; those acts of
torture and war crimes are directly attributable to United
States government and the chain of command going here all
the way up through Rumsfeld, Cheney and Bush at the very
top.

40 What does the Field Manual say about torture? This document
that all lawyers working for the United States government in

this area of Foreign Affairs National Security and the laws of war know about, and we have all studied this in law school. 1

What does it say? The index says "*Torture Forbidden*." That's the index, page 233. So all any of these lawyers had to do was to open the Field Manual, look at the index for torture, and it would say "*forbidden*". It then refers you to "*civilians and prisoners of war*". What does the Field manual said about these two categories of people? 5

First, civilians, page 107, paragraph 270. In bold and capital letters as Judge Baxter puts it – "*Prohibition of Coercion*". It says that. "*No physical or moral coercion shall be exercised against any protected person.*" 10

I discussed that yesterday. We had 3 witnesses here, all of whom were civilians, all of whom qualified as protected persons. No physical or moral coercion shall be exercised in particular to obtaining information from them or from third parties. Nothing could be clearer. You cannot perform any type of coercion, let alone torture, cruel, inhuman or degrading ... And, you certainly cannot threaten to rape, or torture, or murder a relative in order to get information. 15 20

Paragraph 271 then says quite clearly – "*Prohibition of Corporal Punishment, Torture, etc* – "*The High Contracting Parties specifically agree that each of them is prohibited from taking any measures of such a character as to cause the physical suffering or extermination of protected persons in their hands.*" 25

Physical suffering: we've heard from the three witnesses who said they have suffered and we have submitted the two other Statutory Declaration and reams of information on other individuals. 30

Extermination: We saw the estimate yesterday, in the video, that probably somewhere in the area that 130 people are exterminated while in the hands of United States forces directly accountable through the chain of command to Bush, Cheney, and Rumsfeld. 35 40

1 To go back to paragraph 271, *"This prohibition applies not only*
to murder, torture, corporal punishment, mutilation and medical
or scientific experiments not necessitated by the medical treatment
of a protected person, but also to any other measure of brutality
5 *whether applied by civilian or military agents."*

So it's quite comprehensive and quite clear, there are no
exceptions, no equivocations, no caviling, no playing around
with words. This is their own Field Manual that apply to all
10 of them and they knew it from Bush on down. There it was,
plain English, their own manual, binding on them and, of
course, the lawyers knew because everyone dealing in this
area knows of this Manual.

15 And by the way, paragraph 499 says of the Field Manual, *"The*
term 'war crime' is the technical expression for a violation of the
law war by any person or persons, military or civilian."

20 So notice, the military, the chain of command, Bush, Cheney,
Rumsfeld, and all the military on down; the lawyers for
conspiracy, complicity, aiding and abetting; the CIA under
the control ultimately of Tenet and Bush; civilians contractors;
these are all war crimes. Every violation of the law of war is a
war crime. That's what their own Field Manual said. It's very
25 clear. Any of the lawyers could read this and figure it out for
themselves.

As my colleague also pointed out, in the event of a dispute as
to the status of a person who is captured in times of armed
30 conflict, under Article 5 of the Third Geneva Convention of
1949, that person has to be presumed to be a prisoner of war.
Under the Geneva Convention number 3, unless and until
there is convened a competent tribunal to enquire into their
status, and so far since 9/11, to the best of my knowledge, an
35 Article 5 competent tribunal has not been convened to
determine the status of anyone. These so-called *"Combatant*
Status Review" tribunals, as pointed out, are nothing more than
kangaroo courts and they are not the regular Article 5
Tribunals that the Pentagon has used in the past. So
40 presumptively, everyone still remains a prisoner of war under
the Third Geneva Convention.

What does the Field Manual say about these people? And by the way, they're still languishing on Guantanamo, and in Bagram, and all over in Afghanistan at US bases there. 1

"No physical, or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatsoever." 5

That is in paragraph 93 of the Field Manual at page 37. Nothing can be clearer. It's right there in their own manual. 10

"Prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantages treatment of any kind." 15

That's their own manual. It's right there.

That is the reason, why then, you have in the Bundle the Military Interrogation Manual 34/52 of 1992. That was applicable, at all times relevant, to these proceedings. If you read the manual, it says quite clearly that United States armed forces shall be governed at all times by the Geneva Convention. And it expressly rules out torture, cruel, inhuman, and degrading treatment for any reason for purpose of interrogation or otherwise. 20 25

So notice, the professional military interrogators who interrogates during times of warfare on the basis of US Army Field Manual 27-10, and the Nuremberg Charter, judgment and principles, and the Geneva Conventions expressly rule out torture, cruel, inhuman and degrading treatment, even if major warfare among large scale combatants, let alone against a picayune little terrorist like Al-Qaeda. That was the professional military judgment. It was illegal, it was criminal, and it was counterproductive, and we will not do it. And it was Bush who gave the order to violate that manual 34/52, and US Army Field Manual 27-10, and the Geneva Conventions, and the Convention Against Torture. 30 35

As for Al-Qaeda – they are protected by Common Article 3 to the four Geneva Conventions of 1949. They still have their basic human rights under the Geneva Conventions. And that 40

1 can be found in Article 3. And what does Article 3 say? Apply
to the United States – and this is now considered customary
international law and *jus cogen*.

5 *“Each party to the conflict shall be bound to apply as a minimum.
Persons in all circumstances shall be treated humanely, and to this
end, the following act shall remain prohibited at any time and any
place whatsoever with respect to the above-mentioned persons, that
is people which are no longer in any type of combat.”*

10 So, you are talking about the captured Al-Qaeda personnel.

- a. violence to life and person, in particular
- 15 b. murder of all kinds, mutilation, cruel treatment and
torture,
- c. outrageous upon personal dignity, in particular
humiliating and degrading treatment,
- d. the wounded and sick shall be collected and cared for

20 And yet we have seen wounded and sick Al-Qaeda tortured,
deprived of medical treatment, etc. I don't have a brief for Al-
Qaeda. I have a brief for the Geneva Conventions, and US
Army Field Manual 27-10, and US Army Field Manual 34/52.
I have a brief for the Convention Against Torture. I have a
25 brief for the United States Constitution that expressly
recognised, in Article 6, that treaties shall be the supreme law
of the land. I have a brief for the United States Supreme Court
decision in *Paquete Habana* ruling that even customary
international law is part of United States law itself – and I am
30 licensed to practice law before the Supreme Court of law
where I have taken an oath to uphold the constitutional laws
of United States. That is my brief and that's what brings me
here today.

35 As the Supreme Court ruled, in the *Hamdan* decision, even
Al-Qaeda are protected under Common Article 3 of the four
Geneva Conventions of 1949 in all circumstances – protected
from cruel treatment, torture, outrages upon personal dignity,
humiliating and degrading treatment and they must be
40 collected and cared for if they are wounded and sick. Indeed,
in his separate opinion in the *Hamdan's* decision, Kennedy J,
who is no liberal, I can assure you, said that,

"Violation of the Geneva Conventions is a war crime under the United States War Crimes Act." 1

And although he didn't point this out, if you read it, if death occurs, you can be subject to death as well, not that I support the death penalty for anyone, but to indicate the severity of the offences involved here committed by the defendants. 5

So, Your Honours, even in accordance with the United States government's own Field Manual, applicable to all these defendants; even in accordance with United States federal criminal law which makes murder, torture, cruel, inhumane, degrading treatment, sexual abuse, maiming, federal felonies. 10

These individuals are all guilty beyond a reasonable doubt. And in order to uphold the principles of international law and in order to uphold the United States Constitution itself, we the prosecution and we the people of the world ask you to find all the defendants guilty as charge. 15

Thank you. 20

Jason Kay Kit Leon:

Your Excellencies, may we request that submissions from the Amicus be taken first thing tomorrow morning? 25

Judge Lamin Mohd Yunus (President):

Okay, we shall commence tomorrow at 9am.

Registrar Musa Ismail:

All rise. 30

* * * * *

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Registrar Musa Ismail:

All rise.

Jason Kay Kit Leon:

May it please the Tribunal, I have prepared the written submission which the Registrar shall now distribute to the Tribunal.

[Registrar hands *Amicus* submission to the Tribunal]

If I may begin?

Judge Lamin Mohd Yunus (President):

Proceed.

Jason Kay Kit Leon:

Your Excellencies, the prosecution has presented a formidable case of Torture and War Crime against the 8 accused. I would like to place on record the humility I feel at sitting across the bar table from both prosecution counsels, Professor Nijar and Professor Boyle. Save for a few brief moments of lapse, Professor Nijar's submission was thorough and devastating, and Professor Boyle was, and is, perhaps the most eloquent advocate I have had the honour of listening to in person.

Save for a short outburst on day 2, Tuesday, regarding the issue of Ali Shalal and the photo, I have purposely maintained my composure and refrained from standing up and down, objecting to the slightest issue that could be objected. I did this because I am reminded of my role as *amicus curiae*.

I am a friend of the Tribunal, assisting it to get to the heart of the matter, by getting a broader picture from the witnesses, and keeping the prosecution in check in its zeal to prosecute alleged torturers and war criminal.

I purposely did not act as a defence counsel whose task is to break down the witnesses, raise objection after objection and provide some excitement to the otherwise staid proceedings.

To those who think I have been too sedate, compared to the last time, well, I am not a clown, nor am I here to badger the witnesses for your amusement. I am here as a friend of the Tribunal.

And as friend of the Tribunal, what questions I did ask of the 3 witnesses were, to my mind, very relevant. I admit I probably should have not pressed the point with PW3 Jameelah about whether the beatings were for hours, or minutes, because, as succinctly put by the Learned President, "*a beating is a beating.*" I am grateful for that guidance.

It is indeed true: Torture is torture, whether it is committed against a man or a woman, white, black, yellow, brown or any colour in between, to a Muslim, Hindu, Christian or Jew – if I may paraphrase Gandhi here. It does not matter who does it or to whom it is done. Wrong is wrong.

But is it wrong in international law? That's the task for the prosecution to shoulder. They have to prove beyond a reasonable doubt that the 8 accused have indeed committed torture.

Have they proven it beyond a reasonable doubt? Let's break it down one by one.

The prosecution started off its case by bringing 3 witnesses to testify under oath as to what happened to them. All 3 witnesses gave varying accounts of being taken/abducted, brought to a facility, supposedly, under the command of American military and thereafter subjected to various extreme conditions that the prosecution labels as torture.

First question: Can we believe their account of what happened to them? The purpose of cross-examination (by defence counsel, or *amicus* in this case) is to elicit the hidden facts that were not apparent at first blush during the examination-in-chief by the prosecution. What was a very straightforward story/account, under cross-examination can something reveal facets not apparent at first glance.

1 We all were able to hear what 3 of the 5 witnesses said in this
Tribunal here. The other 2, Ali Shalal and Rhuhel, we were
not able to hear the words from their own mouth. Was Rhuhel,
5 the boy who went to Afghanistan to smoke ganja/marijuana
with friends, telling the truth, the whole truth and nothing
but the truth in his statutory declaration which is already now
before the Tribunal? We won't really know for sure.

10 But more importantly, we won't get a chance to know for sure.
Why? Because we didn't get to see how he reacts answering
questions. We didn't get to listen to the words from his mouth
with all the nuances that can give us the cue as to whether he
15 was a witness of true or something else. And we didn't get to
ask him the tough questions that may expand his story to give
a whole different tenor to his testimony. That is the very
purpose of cross-examination. And unfortunately for Rhuhel,
his testimony is in the record without going through, if you
like, the testing fire of cross-examination.

20 For example, take the first witness Abbas Abid. He came, face
all covered, and we first got to know him as Chief Engineer
with a dream for a big family. He wanted 15 children. He
only has 5. By my count, that is big. By his count, not big
25 enough.

He then went on to tell us of what happened to him, first at Al
Muthanna Brigade HQ, then at Al-Jadiria. Only during cross-
examination did he reveal that he was a government servant
in the government of Saddam Hussein, admittedly, not the
30 nicest fellow to have walked the earth. Was that oversight
deliberate? I don't know. I do not wish to speculate. But it
does make me wonder what else was left out. Especially in
his account about the being tortured.

35 In examination-in-chief, he was identifying this person and
that person as Americans. When asked HOW did he actually
do that, the answer eventually led to the admission under the
hood that was put over his head while he was tortured, *he*
40 *could not identify whether the ones who tortured him were*
Americans or not. He said this even during re-examination
by the prosecution. So that is that for PW1.

For completeness sake, it is regrettable that the *prosecution has not provided the Court with any documentation linking with the Al Muthanna Brigade HQ, nor the Al-Jadiria facility as being American controlled.* I am minded that judicial notice can be taken, but the above 2 facilities are not as famous as Guantanamo which was clearly American.

So from where I stand, there is not a shred of evidence that links either Al Muthanna Brigade HQ, nor the Al-Jadiria with the Americans and the testimony of Abbas does not identify Americans as being the perpetrators. In addition, *there is also no medical report tendered to confirm the injuries of Abbas.*

I humbly submit that this Tribunal find that for the torture of Abbas, sad as it may be, has not in any way been proven to be linked to the Americans in any way by the prosecution.

With Jameelah, PW3, we have a strong woman, a respected woman in the community, a widow who raised 3 children after the death of her husband in 1999. She is a proud Baath party member, and would have provided money to the resistance if she had extra. Why was this not in her statement? She was very vocal, passionate and overflowing (even to the extent of volunteering information after re-examination) in her testimony, always hinting that what she said was merely the tip of the iceberg, but never saying more.

Even the rapes alleged in the last paragraph of her Statutory Declaration were made very generally as *"Women have suffered tremendously and many have been raped."* Upon further questioning, she admitted that that is hearsay evidence and she did not in fact witness said rapes.

So, was she tortured by the Americans? There are 2 exhibits to her Statutory Declaration. The first is an extremely faint document titled *"Release form for detained civilians"* with the handwritten portions visible but not much else of the printed portion is readable. The second is an ICRC certification that she was detained from 13/1/2004 to 22/6/2004. No mention is made of where she was detained. Other than her say so, *we have no proof that she was detained at an American facility. Her identification of her torturers as*

1 *Americans is also based on conjecture from the assumption*
that since she was in the American part of Iraq, she was
therefore assaulted by American nationals. This remains
merely an assumption. There is no actual identification.

5 And speaking of identification, we have the non-attending
witness, Ali Shalal. If his testimony in the statutory declaration
had been tendered as was done with Rhuhel's one, that would
have been quite uneventful. But the prosecution did one up
10 and linked it to the photo of the hooded man standing on a
box. Now that's a problem.

The TRUTH is what fallible human courts, tribunals, are
supposed to arrive at by the whole trial process. One side
15 puts up a story, it is tested by various means and according to
generally accepted rules that are called procedure. They differ
from one place to the next, but the binding thread in all of
them is that they are designed to try their best to 'get to the
truth' in the best possible manner. *Witnesses are humans. And*
20 *they are subject to the same human weaknesses as all of us.*
Exaggeration is one of them. We have seen quite a few
instances in this trial and the last one.

By linking, however subtly, the statutory declaration of Ali
25 Shalal to the newspaper cutting, by waving it in the air, the
prosecution makes that link. Now, there is a problem with
such a link. The problem is this: We cannot be too sure whether
Ali Shalal is indeed the man in the photo. Ali Shalal himself
cannot be certain he is the man in the photo – he was under a
30 hood, after all.

So what? Does it matter? The prosecution went, very logically
to say, and I paraphrase here, *"If it was not him, better, it means*
35 *that this was done to at least 2 persons"* implying if more than 1
person were to have been treated in this fashion, it bolsters the
prosecution's case. That is true. This is logically true.

But consider this. *The possibility of Ali Shalal NOT being*
40 *the man in the picture raises a question mark over his account,*
which unfortunately is only in the form of a statutory
declaration before this Tribunal. *Is his testimony the truth,*
the whole truth and nothing but the truth? We cannot ask

him. Does it matter that his testimony be as closest to the truth? Yes. Yes it does. Especially on issues like torture. 1

It is reported, yes, in the New York Times, that he has identified with that picture, saying that it is him. He even puts that picture on his business cards. But one has to ask: If he was in the hood, how would he know for sure if that picture was in fact of him? But more importantly, if there is a chance it wasn't him, is there any benefit he claims that he is the man in that picture? Is there any benefit if he exaggerates a little and say that person is he? 5 10

Why, of course there is a benefit. There is a big benefit. That is the defining picture of Abu Ghraib. That is the defining picture that turned the tide on the war on terror. That picture, if it's YOU, will open doors for you that you never knew existed. Doors which may lead to fame. Is *Ali Shalal a publicity hunter? We may never know. Is Ali Shalal telling the truth? We never got to ask him.* 15 20

The New York Times series of articles report that:

"Ali Shalal Qaissi, soon emerged as their chief representative, appearing in publications and on television in several countries to detail his suffering. His prominence made sense, because he claimed to be the man in the photograph that had become the international icon of the Abu Ghraib scandal: standing on a cardboard box, hooded, with wires attached to his outstretched arms. He had even emblazoned the silhouette of that image on business cards. 25 30

The trouble was, the man in the photograph was not Mr. Qaissi. [Editors' Note]

Military investigators had identified the man on the box as a different detainee who had described the episode in a sworn statement immediately after the photographs were discovered in January 2004, but then the man seemed to go silent. 35

Mr. Qaissi had energetically filled the void, traveling abroad with slide shows to argue that abuse in Iraq continued, as head of a group he called the Association of Victims of 40

1 American Occupation Prisons. ... This week, after the online
magazine Salon raised questions about the identity of the man
in the photograph, Mr. Qaissi and his lawyers insisted he
was telling the truth.

5 Certainly, he was at Abu Ghraib, and appears with a hood
over his head in some photographs that Army investigators
seized from the computer belonging to Specialist Charles
Graner, the soldier later convicted of being the ringleader of
10 the abuse.

15 However, he now acknowledges he is not the man in the
specific photograph he printed and held up in a portrait that
accompanied the Times article. But he and his lawyers
maintain that he was photographed in a similar position and
shocked with wires and that he is the one on his business
card. The Army says it believes **only one prisoner** was treated
in that way. "I know one thing," Mr. Qaissi said yesterday,
20 breaking down in tears when reached by telephone. "I wore
that blanket, I stood on that box, and I was wired up and
electrocuted."

25 In the spring of 2004, Mr. Qaissi approached Muhammad
Hamid al-Moussawi, the deputy director of the Human Rights
Organization of Iraq, and proposed that the men set up a group
for prisoners of the occupation, Mr. Moussawi said this week.
Yet Mr. Qaissi never claimed at the time that he had been the
man in the photograph, Mr. Moussawi recalled.

30 A journalist who interviewed Mr. Qaissi three times that May
and June about what happened at Abu Ghraib similarly said
he never mentioned the pose or the photograph. The journalist,
Gert Van Langendonck, said Mr. Qaissi mentioned the other
cruelties he described in the Times profile.

35 A lawsuit Mr. Qaissi joined, filed on July 27, 2004, also made
no allegation that he was shocked with wires or forced to stand
on a box.

40 ... Mr. Qaissi seems to have first begun identifying himself as
the hooded man in the fall of 2004,

Soon, Mr. Qaissi was featured in numerous profiles, including in *Der Spiegel*, reprinted by Salon, as well as on the PBS current affairs program "Now," where he described being shocked: "It felt like my eyeballs were coming out of my sockets." With his soft voice and occasionally self-deprecating humor, he has impressed interviewers as affable and credible. He told his story with a level of detail that separated it from that of many others.

And on this, please see See Prosecution Bundle 3B, page 1188, para 32, line 3:- "As the electric current entered my whole body, I felt as if my eyes were being forced out and sparks flying out."

This all raises the question again: So what? So what if it was not Ali Shalal in the photo. The photo exists. Ah, but that is layman talk. This is Tribunal of law. We talk law here also. And law is about facts, first and foremost.

"It is easy to confuse photographs with reality. To many of us, photographs are reality." This also links later with my point on the movie that was shown, "Taxi To The Dark Side".

"We see the picture of the Hooded Man. We imagine the abuse. Quotes from Clawman in the accompanying text confirms our worst suspicions about what happened at Abu Ghraib. Our beliefs about the picture are confirmed – except that we know nothing more than when we started. We have learned nothing. ... One human rights worker suggested that it made no difference whether Clawman was really the Hooded Man – that his testimony was no less valid. I do not agree. Now we are talking about reality – not about photographs. Clawman was a prisoner at Abu Ghraib. He was most likely subjected to abuse, but whatever his account might be, it's not the account of the man in the picture. That man is Gilligan – not Clawman."

We saw the movie "Taxi to the Dark Side". We imagined reality as that. But it's not. That was a highly produced, **carefully edited** movie to present a view which may not be the view that is near the truth. It may even be a skewed view. If it were unedited video, it would be better. Of course, we would all

1 be sleeping, but for the purposes of video evidence in a court/
tribunal of law, unedited is better than edited.

5 If maker can come and give evidence about the video or
photograph, that's even better. Because that would better help
us get to the truth. And that is precisely why I made it a point
to raise the doubt that there is a possibility that Ali Shalal
10 may not have been the man in the photo – but I did it only
after the prosecution made that link. Without that waving of
the newspaper cutting, it would have been a very uneventful
tendering of a previous statutory declaration by a witness who
cannot attend, I would just stand up for a short point on the
inherent dangers of hearsay evidence and that would be it.

15 I move on now to Moazzam Begg, PW2. He exudes the
confidence and serenity that belie the treatment he had been
through. Was he detained by the Americans? Of course he
was. He was at Guantanamo and Bagram for goodness sake.
20 As with Abbas, it is most unfortunate that his testimony
during Examination-in-chief focused on his life starting at the
point he was captured and incarcerated. That gives such a
myopic view of a life. Moazzam is more than his sufferings.

25 During cross examination we found out owned a bookstore,
and had spent a few day at a training camp in Afghanistan.
Why had these facts not been disclosed in his earlier statutory
declaration made in 2009? They were already common
knowledge by then, having appeared in newspapers. We also
30 learnt that at Guantanamo there are books, and while he did
not get to read current affairs, he was able to read Dickens
and the first 5 Harry Potter books.

35 I believe this is an opportune moment to view a video, if there
is no objections as to ***the type of medical care that is available
at Guantanamo***. I wish to air a short clip, not more than 15
minutes.

40 As an introduction: This is from the movie SICKO by Michael
Moore which came out in 2007. The story concerns the
American health care system, and the movie is basically a
scathing summary of what is wrong with it. To make a point,
Michael Moore got 3 rescue workers from the 9/11 incident

and attempted to bring them to Guantanamo Bay to try to get the healthcare they did not get back Stateside. He begins with the question: They say that you can judge a society by how it treats those who are the worst off. But is the opposite true? That you can judge a society by how it treats its best? 1
5

Video from

<http://www.youtube.com/watch?v=SpSgDeCYdfY&feature=relmfu>
(starts at time stamp 2:18)

and continues with 10

<http://www.youtube.com/watch?v=nxV1xbQtsQQ&feature=relmfu> (stop at time stamp 4:40)

[Video begins – excerpt from “SICKO”]

(Moore) 15

They say that you can judge a society by how it treats those who are the worst off. But is the opposite true? That you can judge a society by how it treats its best? Its heroes? 20

(man 13)

The firefighters and police, rescue and recovery workers have responded with true heroism. It was their initial heroism that thwarted the objectives of the terrorists. Without regard, in many instances, to their own safety and security, - They truly are heroes. 25

(man 14)

We owe them everything! Here they are, the men and women who have been on the front lines for New York, and for all of us in America! Tonight is dedicated to you! 30

Don't forget about the raffles going on over there - one dollar each.

I spent two and a half years down there. I got upper and lower breathing problems. I need a double lung transplant, but was diagnosed with pulmonary fibrosis. 35

I haven't slept in a bed in over five years, I sleep on a chair with a blanket, because if I lay down I can't breathe. 40

1 (Moore)

There were hundreds of rescue workers on 911 who were not city employees. But rather ran down to Ground Zero on their own to help out.

5 We need volunteers for first aid!

(Moore)

10 And many developed serious respiratory illnesses. That's when the government said: *"They're not our responsibility because they weren't on our payroll."*

15 John Graham is an EMT volunteer from Paramus, New Jersey. He was in Lower Manhattan when he heard the planes hit. And rushed over to help. He worked in the rescue effort for the next few months. But then had trouble receiving benefits for his illness. They just deny you for any reason. It's just a terrible waiting game. I really feel like they're waiting for you to die. It's terrible. I never thought that we would do this, that the United States
20 would do this.

(Moore)

25 William Maher is a volunteer member of New Jersey's fire service. He spent to months working near The Pile at Ground Zero. Recovering bodies or body parts. And it deeply affected him.

30 I'm experiencing a lot of disturbing dreams, or whatever you'd like to call them, and it affected what I was doing at night, and unaware of it because I was asleep and I just kept grinding and grinding my teeth. The upper fronts are damaged, practically beyond repair, because of my constant grinding over the last three years. I've been before a workers' comp board already for the 9/11 volunteers' fund. I've been denied three times, and
35 hopefully I will go on my fourth appeal soon, if I can get the necessary documentation.

(Moore)

40 Of course. There was a \$50 million fund set up supposedly to help rescue workers.

Ladies and gentlemen, the governor of New York, George Pataki.

(Moore)

But the government. Like the health insurance companies. Made it very difficult for people to receive help. You have to have spent a certain amount of time at Ground Zero, you have to be able to establish that. You do have to file an affidavit within the next year, relating your work experiences at Ground Zero. And then, even with all of that, it's not automatic. There is a presumption when certain illnesses occur, but that presumption can be rebutted by other medical evidence.

We think it is a very fair approach that protects our heroes. I'm sorry.

(Moore)

Reggie Cervantes was a volunteer medical technician on 911.

Nothing makes it go away sometimes. Not water, not cough medicine, anything. It's just burning in my throat and irritated and it just gets me to coughing. Sometimes I have trouble breathing 'cause I can't catch my breath.

(Moore)

Reggie spent her days at Ground Zero carrying bodies and treating other rescue workers.

My airway was totally burnt that first week, and I had trouble breathing by then. But we wanted to see if we could dig anybody up alive, we wanted to see if we had lost anybody, if we were still missing somebody. I wanted to help. I was trained for this. You know, you see somebody who is in need, you help 'em.

(Moore)

Reggie had difficulty getting treatment. Too sick to work and with no income. She was forced to quit her job. And used her savings to move her and her kids out of the city.

It's hard to figure out how you're supposed to get help. We're trying to go about it the right way. But we're ignored.

(Moore)

But not everyone after was ignored by the government.

1 We're now approaching the five-year anniversary of the 9/11
attacks. So I'm announcing today that Khalid Sheikh Mohammed,
Abu Zubaydah, Ramzi Binalshibh, and 11 other terrorists in CIA
5 custody, have been transferred to the US naval base at
Guantanamo Bay.

(man 15)

On that island are some of the world's most hardened enemy
combatants.

(man 16)

These detainees are deadly and include the 20th hijacker, as
well as a number of Osama bin Laden's personal bodyguards
and others who had a direct role in the September 11 attacks.
15 The kind of people held at Guantanamo include terrorist trainers,
bomb-makers... Many of them have American blood on their
hands and are the elite of al-Qaida.

It seems to me we have an obligation to treat these individuals
20 as enemy combatants.

(Moore)

And then I learned it wasn't all bad news at Gitmo.

(man 16)

25 Detainees representing a threat to our national security are given
access to top-notch medical facilities. They have acute care 24
hours a day, in which surgical procedures, everything can be
performed right there in the detainee camps.

30 This is the dental clinic, or the health clinic. We have a physical
therapy department, X-ray capabilities with digital X-rays. We
have one single operating room. Health personnel to detainee
ratio is one to four, remarkably high. They do sick call on the
35 blocks three times per week, care for them there if they can, or
bring that detainee back to the clinic to be seen there.

40 Screening for cancer has taken place. Colonoscopy is a procedure
which is performed there on a routine basis. We have diabetes,
high blood pressure, high cholesterol. We monitor the weight
and nutrition of the detainees, so that we can track those

detainees to make sure we see them frequently, monitoring their labs and their overall health. 1

Their medical attention... They get way better medical treatment than I've ever had. 5

- You think it's as good as most US HMOs?

- Certainly very similar and as good, sir.

(man 15) 10
I leave with an impression that healthcare there is clearly better than they received at home, and as good as many people receive in the United States of America.

(Moore) 15
Wow! So there is actually one place on American soil that had free universal healthcare. That's all I needed to know. I went down to Miami. Florida. Got myself a boat. And loaded up Bill. And Reggie and John.

John, welcome, sir. 20

And anyone else I could find who needed to see a doctor and couldn't afford one. So many people showed up. I had to get a couple extra boats. And I called up Donna Smith from Denver, who is now on nine different medications. And asked her if she'd like to come along. I figured she'd like to get out of her daughter's basement for a while. 25

All right, let's go. 30

Which way to Guantanamo Bay? Can we go? We're not going to Cuba! We're going to America! It's American soil!

We made it. There it is. There's the runway. That's the prison over there where the detainees are. 35

- (Reggie) We're very close.

- Yeah, we're very close. 40

The white building is the hospital, I think. OK, let's go.

1 (Moore)

We commandeered a fishing boat and sailed into Guantanamo Bay. As we approached the line in the water between the American and Cuban side. We were told to be careful for mines.

5 Permission to enter. I have three 9/11 rescue workers. They need some medical attention. These are 9/11 rescue workers! They just want some medical attention! The same kind that al-Qaida is getting. They don't want any more than you're giving the evildoers, just the same!

10 Hello.

15 No one in the guard tower was responding and then we heard a siren. We figured it was time to get out of here. But what was I supposed to do with these sick people and no one to help them? I mean. Here we were stuck in some godforsaken Third World country. And communists. No less. When I was a kid. These people wanted to kill us.

20 What was I supposed to do?

(*"I'll See You in C-U-B-A"* by the Austin Lounge Lizards)

25 [End of *"SICKO"* video clip]

Jason Kay Kit Leon:

If anybody is wondering, they **did** get medical attention in Cuba.

30 Yes, *Amicus* is submitting that Guantanamo is not all that bad. Based on that video. But then, how can we know the full story from a mere 15-minute clip.

35 How indeed?

40 In fact, can we really get the story from a 1-hour plus movie like *"Taxi To The Dark Side"*? It is a good movie, alright, documentary. But it has a narrative, and that narrative has a purpose: To make us see the Dilawar story. Is that the only story to be told from Guantanamo? Of course not.

Does it prejudice the 8 accused? Yes. Of course it does. It makes 1
it look like all 8 of them are some horrible people. Does it tell
the story of "WHY"? No it does not.

Did I object to it being shown even when I only had about an 5
hour or so notice that the prosecution intended it to be shown?
Of course not.

Because *I am here to assist the Court, not attack the* 10
prosecution's case. I am here to point out where the
prosecution may be overstating something, or understating,
or not stating, or accidentally misstating it. So I do not object
to it. I do not object to the fact that it shows contrite, or
seemingly contrite low-level soldiers blaming the situation,
blaming not being trained well enough before having to do 15
interrogation, and basically blaming the higher-ups for their,
the soldier's, own acts of harming the prisoners under their
care.

Anyone doing criminal law will know how accomplices will 20
usually turn on one another upon being caught, saying that
the other one was the mastermind, and that he was the
innocent, unwitting, naive or stupid person who tagged along
for the ride and got entangled in the mess. Of course we've
heard of this. Of course the low level people will point up 25
and say, "*Command Responsibility*". And people want to believe
that those in command are omnipresent and omniscience.
That's really what command responsibility is all about. The
rogue soldier, the rogue underling saying, "*Boo-hoo. Poor me.*
I am the victim for doing all these bad naughty things to those people. 30
It's my boss' fault".

Haven't we heard that one before? Of course we want to 'get'
the boss. That's the marquee name. That's the big fish. And
so we close our eyes to the fact that maybe, just maybe, the 35
low-level soldier indeed was rogue, or nuts, or a sadist, or
whatever. Forget about him, or her. Get the big fish.

So how does international law 'get' the big fish? By saying
'command responsibility'. That's the simple way out. That's 40
the magic phrase.

1 From a standard of "what the superior actually knew" at
Nuremberg, it became "constructive knowledge" and "negligent
disregard" at Tokyo Tribunals, and Geneva Protocol I added
5 "knowledge the superior should have had" and "standards of
negligence for not knowing."

That's a little like cheating: moving the goalpost. And this
totally disregards that fact that America did **not** ratify Geneva
Protocol 1.

10 Now why would I even bother talking about the United States
of America not ratifying Protocol I. Surely that doesn't matter
right? Surely we can catch it all under the big umbrella that is
"customary international law". Ah, that's the other magic, super
15 phrase. Just say it, and everything will be ok.

But is that really the case?

20 *Customary international law and jus cogens are like the
snake-oil of international law.* It can cure everything. Sprinkle
a little, and any situation can be covered.

Really?

25 Does every country agree on the definition of "*torture*"? For
example the definition in Article 1 of the 1984 CAT? Malaysia
doesn't. I wonder why? But no matter, it's customary
international law. That should fix everything.

30 Does it really? No. No it does not.

When you think about it, international law really boils down
to *TREATIES*. What countries, in their sovereign state decide
to do when they are relating to other countries.

35 *International law is basically what treaties say they are* –
forget about *jus cogens*, forget about customary international
law. It is treaties, i.e. what countries/States **want to be bound**
by, in their absolute discretion – and what more, it is only
40 treaties that parties *sign, ratify, and don't put reservations to*
that are binding.

Each individual State is a sovereign nation. If it wishes to join the fold and become part of the community, the world community, of nations, logically, it has to make agreements, sign treaties, with other nations, or join the normal general treaties that most nations subscribe to. It's like joining a club. UN is a club.

You don't have to. But if you do, you agree to be bound by and adhere to the standards and norms of that club. And by extending the club analogy, there are various forms of memberships for nations, just as there are different classes of nations at the United Nations. Some have veto. Others don't. Is it fair? Of course not. But without that veto, they wouldn't join. Why? Because they had the big guns, called nuclear weapons, and if you don't give them them a nice big chair and that loud megaphone, they won't come to your party and play nicely.

The very fact that any nation can choose to sign or not sign, and then either ratify or not ratify, and lastly, put in a reservation or accept the treaty wholeheartedly is a clear indication, nay, it is proof positive that in the realm of international relations, one thing is absolutely certain: All States come to the table as sovereign nations. They owe no other nation anything when it comes to deciding in what manner and how exactly they will join the community of nations.

Conscience guided by law and justice cannot turn a blind eye to the fact that international law exists because each and every country in the world at one point decided that, "Yes, I do not want to be an island. I need to be part of the community of nations, I will therefore fall in line and be part of it by accepting and performing the obligations under it".

Treaties are contracts. And they are written down. What is not written down is not agreed to. There are, of course, oral treaties, which are envisaged by Vienna Convention Article 2(1)(a). This is basic contract law. This is basic treaty law.

Do permit me to quote from the Quran on this, from Surah Al-Maedah, verse 1 (the translation is by Yusuf Ali):

1 “O ye who believe! fulfil (all) obligations. Lawful unto you
(for food) are all four-footed animals, with the exceptions
named: But animals of the chase are forbidden while ye are in
5 the sacred precincts or in pilgrim garb: for Allah doth
command according to His will and plan.”

Ah, but the wet-behind-the-ears international law student will
ask: What about customary international law? What about
10 *jus cogens*?

Here’s the painful answer: It does not mean a thing. Not for
international law that relates to war, at least. For international
contracts and stuff involving money, yeah, people will play
by the general rules generally laid down.

15 But here’s the sad truth: ALL IS FAIR IN LOVE AND WAR.
Especially war.

20 *War is like a black hole.* The general theory of relativity posits
that there are black holes, and in the centre of black holes
there is the singularity where the laws of physics cease to exist.

War does that to laws of man. To international laws even.

25 From the 19th century until World War I, States had sovereign
rights to go to war for *good reason, bad reason or no reason*.
After World War I, under the Covenant of the League of
Nations, States were *prohibited from going to war in certain*
30 *circumstances but allowed to go to war in other*
circumstances. After World War II, under the UN Charter,
States are *prohibited from unilateral threat or use of force*
except in self-defence.

35 Our submission? After 9/11, after the war on terror, the law
now, the international law now is: “Torture is OK”.

Video sequence about the TV series “24” - Is 24’s Jack Bauer
Teaching Torture to U.S. Soldiers – from [http://www.youtube.com/](http://www.youtube.com/watch?v=LdxV6G19R8o)
40 [watch?v=LdxV6G19R8o](http://www.youtube.com/watch?v=LdxV6G19R8o)

[Begin video clip - Is 24's Jack Bauer Teaching Torture to U.S. Soldiers] 1

WOLF BLITZER:

It's a hit American TV series seen around the world and critics say it may be encouraging U.S. troops and others to engage in torture. 5

Let's turn to CNN's Carol Costello. She's in New York with this story — Carol. 10

CAROL COSTELLO, CNN CORRESPONDENT:

You know, it's hard to wrap your mind and this one, a TV show influencing professional soldiers. But there are some who say it is and it's dangerous. An advisory to our viewers, although "24" is a fictional TV show, the images we're including in the report, well, some of them may disturb you. 15

(BEGIN VIDEOTAPE)

20

COSTELLO (voice-over):

Torture as a tool. It's used often and effectively in the Fox TV counterterrorism drama "24".

UNIDENTIFIED MALE:

25

436.

COSTELLO:

That's "24's" good guy torturing his own brother. Jack Bauer, the tough, sensitive undercover operative justifies his options to save America from Islamic extremist who have just detonated a nuclear bomb in Los Angeles. 30

That the fictional hero would torture is disturbing to Human Rights First. It worries American soldiers want to be like Jack. 35

(on camera):

How do you suppose a soldier in Iraq would want to be like Jack Bauer?

40

1 UNIDENTIFIED MALE:
Well, Jack Bauer is very seductive. He's the hero. He's always
right. He always wins. He saves the day in the end.

5 COSTELLO:
And while that sounds far-fetched, Ken Robinson, a national
security analyst who served in special operations units including
the CIA, says "24" is becoming a problem.

10 KEN ROBINSON, TERRORISM ANALYST:
The United States military is concerned about it because they've
started receiving evidence that soldiers in the field have been
impacted by it downrange in Iraq, utilizing techniques which
they've seen on "24" and then taking them into an environment
15 into the interrogation booth.

COSTELLO:
Fox declined to talk with us, but one of "24's" co- executors
producers in a pod cast interview with "TVWeek.com" did
20 respond.

DAVID FURY, FOX "24":
One would think that their training would be far more extensive
in the real world and that they understand that this is a heightened
25 reality.

COSTELLO:
And from Kiefer Sutherland, the actor who portrays Jack Bauer.

30 KIEFER SUTHERLAND, ACTOR:
There hasn't been a torture sequence that my character has been
involved with that there isn't some kind of a negative
repercussion whether it's emotional...

35 COSTELLO:
Still, Danzig's (ph) and a general from West Point went to meet
with "24's" writers to get the show to depict torture in a more
realistic way, to show the audience such tactics often don't work,
are against the Geneva Convention and, hence, have
40 consequences. Danzig is hopeful a change is in the works.

(END VIDEOTAPE)

COSTELLO:

Now, Wolf, we did hear from the Department of Defense. In fact, it sent this statement, it says,

"Our policy is to treat detainees humanely. Our men and women who handle detainee operations are professionals and they understand the difference between a TV show and reality."

Wolf.

BLITZER:

All right. Carol, thanks very much.

[End of video clip – Is 24's Jack Bauer Teaching Torture to U.S. Soldiers]

Jason Kay Kit Leon

We all want to say torture is bad. But given the right circumstances, most of us, if not all of us, if not all of us would say, 'Yeah, "Waterboard him." Beat the crap out of him.'

I couldn't ask Jameelah that question on Tuesday. So I say it now, from the Bar. Given the right circumstances, I'd probably say ok to torture too. I'd probably torture too. I am human. And for those of us who have searched our souls and are honest in this room, I think you'll say the same too.

But let's get back to the assertion we made: Torture is now ok after 9/11, after the war on terror. The world has changed. ***International law has changed.*** For the better or for the worst it doesn't matter. ***The legal point is: it has changed.***

The prosecution's view of war is wonderful actually. You go to war, but you have all these rules. Rules that all parties agree to. Rules that all parties will obey. Very idealistic. Very naive.

Wars used to only be fought by uniformed armies on a fixed battlefield – sometimes called a war theatre. There was place where you fought. That's where we get the words like Marathon and Waterloo, and we remember places like Gettysburg and Dunkirk. There was a fixed place with a fixed uniformed army.

1 The laws of war that the prosecution has so thoroughly explained to us yesterday works. Yes. For those wars. For those situations.

5 Today, wars are being fought in realms. Iran, just last month was a victim of a cyber attack. It had to disconnect several of its main Persian Gulf oil terminals from the Internet. Yes, it's a New York Times reference again. When you have an army which declares itself to be an army who is against you, it makes sense to have rules of war. It makes sense to afford the other side the 'courtesy' and respect given to warriors. The code of Bushido for the samurai comes to mind.

15 That was a different age. As an aside, computer hacking used to be the realm of actual geeks who were smart people who put in the hours to learn the ins-and-out of computers. They knew that the knowledge and skill came at a price. And there was a sense of a code for them. Nowadays, any fool who can get his hands on a scripting tool can pretend to be a hacker.

20 In the same way, to be a warrior in days of yore, you had to have skills. You had to have undergone rigorous training which would have, in some ways instilled in you a sense of honour. And having a code of conduct for war, the 'laws of war' if you like, made sense. All the rules of conduct of war was for a different time.

30 But when you start having civilian aeroplanes being used as weapons, when you start having bombs in shoes, when you start bombing Hawaii on a Sunday morning, when you start putting people in gas chambers by the millions, all bets are off. That's when the laws of war change. That's when you start becoming, "the destroyer of worlds" as Oppenheimer sadly wrote. That's when you create something like Nuremberg which was, let's not deny it, victor's justice. And in the words of a former panel member of this Tribunal,

40 *"In full view of international opinion at Nuremberg, the Allied powers, in an agreement drafted decided to try the leaders, including political and military, of the Axis powers. There were prosecutors in full military dress of the Allied powers addressing members of the Tribunal. And no issue of bias*

was raised. Judges were all from the Allied countries. And not a single issue raised of affection or bias, even doubt.” 1

International law changes after wars. That’s our point. And after the war on terror, after 9/11, yeah, we say, “Torture is ok.” 5

For the small point about whether there was breach of United States municipal law – John Yoo and the documents I have quoted in the whole Defence Document Volume 3 have answered that. Let me just give the highlights: 10

(a) The conclusion reached by Michael Stokes Paulsen in his Yale Law Journal article, at page 81 at Volume 3 is, 15

“what is the force of international law, for the United States, and who determines that force and interprets and applies international law for the United States? For all the complexities and intricacies of the details, the summary answer is remarkably straightforward: under the U.S. Constitution, international law is only “law” for the United States when the U.S. Constitution makes it so or empowers U.S. constitutional officials to invoke it in support of their powers. Wherever the Constitution does make it so, such law is always controlled by the (sometimes conflicting) interpretations of the law by U.S. actors and never by the interpretations of international or foreign tribunals. And such international-law-as-U.S.-law is always subordinate to the superior constitutional powers of U.S. constitutional actors; it may be superseded, as a matter of U.S. law, almost at will. 20 25 30

The force of international law, as a body of law, upon the United States is thus largely an illusion. On matters of war, peace, human rights, and torture— some of the most valued matters on which international law speaks—its voice may be silenced by contrary U.S. law or shouted down by the exercise of U.S. constitutional powers that international law has no binding domestic-law 35 40

- 1 *power to constrain. International law, for the United*
 States, is international policy and politics."
- 5 (b) The testimony of the same person before the
 Subcommittee on Administrative Oversight and the
 Court of the US Senate Committee on the Judiciary on
 May 13, 1999 which can be found at page 372 of Amicus
 Bundle Volume 3. In brief, he says,
- 10 i) at page 374, last paragraph, 3rd line *"There exists a*
 basic distinction in the law between what constitutes
 actual, legal "torture," under applicable standards, and
 what may be harsh, aggressive, unpleasant
15 *interrogation tactics but not, legally, "torture."*
 Reasonable people will come to different conclusions
 as to where precisely that line is, but the Bush
 administration's lawyers' ultimate conclusions are
 certainly defensible."
- 20 ii) at page 376, 2nd paragraph from the bottom, at
 point 2, *"Second, even if one disagreed with the*
 statutory and constitutional analysis in the OLC
 memoranda in question, or with the application of that
 analysis to specific facts, the OLC legal analysis and
25 *advice clearly falls within the range of legitimate legal*
 analysis and the range of reasonable disagreement
 common to legal analysis of important statutory and
 constitutional issues."
- 30 iii) page 377, 3rd and 4th paragraph: *"To be sure, some*
 legal arguments and some "legal" analysis is so far
 below the standards of competence, plausibility, and
 good faith as not to be legitimate. But the OLC
 memoranda in question do not come anywhere near
35 *that standard. As noted above, I believe the*
 memoranda's conclusions to be in nearly every respect
 essentially correct as a matter of statutory and
 constitutional analysis. The quality of the analysis
 (despite my quarrels with certain points) is clearly well
40 *within professional standards. This is not even a close*
 question. There is simply no plausible, objective basis
 on which it could be said that the legal opinions

expressed were illegitimate or unprofessional. There is
 no plausible basis upon which one could fairly
 objectively - conclude that the views expressed are
 outside the bounds of reasonable professional judgment
 and legal analysis. If anything, the suggestion that these
 memoranda lie outside the range of legal advice is itself
 a view of the applicable substantive law, and of the
 lawyer's professional role, so extreme and unreasonable
 as not to fall within the range of good-faith, objective,
 competent legal analysis.

Such views probably more reflect an intense political,
 ideological commitment than true legal analysis. It
 cannot be doubted that the issues in question raise
 important questions of morality about which people,
 quite legitimately, have passionate feelings. But one
 should never confuse the intensity of one's political
 passions and commitments with dispassionate analysis
 of difficult questions of law. If this distinction is
 observed, it is not possible fairly to assert that the views
 expressed in the OLC memoranda are outside the range
 of reasonable, professional legal analysis and advice on
 the statutory and constitutional questions presented."

- iv) page 378, point 3. "Third (and in some respects
 building on the observations just made), it is important
 to recognize the clear distinction between a lawyer's
 opinion on questions of legality and endorsement of a
 client's actions themselves. The former in no way
 implies the latter. This is a rudimentary principle of
 legal ethics, recognized in every bar code of professional
 responsibility. ABA Model Rule of Professional
 Conduct 1.2(a) clearly provides that "a lawyer shall
 abide by a client's decisions concerning the objectives
 of representation ABA Model Rule 1.2(b) provides
 that "[a] lawyer's representation of a client does
 not constitute an endorsement of the client's political,
 economic, social or moral views or activities." And ABA
 Model Rule 1.2(d) further provides that, while lawyers
 may not counsel clients to engage in conduct they know
 is illegal, a lawyer "may discuss the legal consequences
 of any proposed course of conduct with a client and

1 *may counsel or assist a client to make a good faith effort*
2 *to determine the validity, scope, meaning or application*
3 *of the law." It is plain from reading the memos involved*
4 *that this is exactly what the OLC lawyers were doing -*
5 *discussing with their clients the legal consequences of*
6 *what they proposed to do and endeavoring to assist them*
7 *to ascertain the meaning and scope of the laws and*
8 *constitutional provisions involved."*

10 Let's not belabour the point. We are not happy with torture
11 being used. Full stop. In this room, I can say that. Everyone
12 can say that.

15 But there is a world outside this room. And outside this room,
16 you don't catch a suspected murderer or rapist or robber or
17 terrorist and give him tea and fruit. You give him Harry Potter,
18 but not tea and fruit. You get information that you need from
19 him so that this world in this room can continue. ***Yes, the needs***
20 ***of the many outweigh the rights of the few.*** Sad to say, but
21 that's true.

25 Torture is being used, has been used, has always been used.
26 Even in times of peace. Anne Boleyn lost her head history say
27 due to a confession extracted through torture. One might even
28 say Christianity started with the torture of one guy on the
29 cross. And let's not talk about what people all over the world
30 have alleged their police forces have done while "*investigating*
31 *crimes*".

32 The prosecution has alleged that detention without trial is
33 torture. It has been said of Guantanamo,

35 *"Previously, they [referring to the USA and Britain] criticised*
36 *Malaysia for purportedly being cruel by detaining people*
37 *without trial. But they are the ones doing it now. They have*
38 *probably just realised that in certain situations, **Malaysia***
39 ***had to detain people without trial.*** *But what they are doing*
40 *in Guantanamo Bay is even more cruel by passing laws*
41 *allowing the torture of detainees,"*

(source uncredited)

We live in the real world. Not ONLY in this very nice room
only where there's plenty of food, gratis, downstairs. 1

I apologise if what I have said have hurt ... someone. Anyone.
I have tried to be a good friend to the Tribunal. 5

And as a final note, I wish to say I am heartened that all 3
witnesses who came here have found the courage and strength
to move on, to be of good cheer, and that was evident during
their time testifying, as you may have all seen. 10

Your Excellencies, I thank you.

Gurdial Singh Nijar:

Thank you Your Honours, if I could briefly respond to the
submission made. 15

I think the submission made, especially the concluding
remarks, amount to this: Look at the real world, everyday
there is murder, everyday there is drug trafficking, everyday
there is child trafficking. The real world out there from a long
time ago until now, all this is happening, so let's get real. Let's
forget about the rules on murder. Let's forget the rules on
child trafficking. What kind of legal argument is this? That
because in the real world there exists all these abuses that,
therefore, a court of law, a tribunal, should rule that all these
activities must be excused. That the thrust of the submission
by the learned *Amicus* and it is an argument that is *so faulty*
at its core that it has, with respect, be rejected *in limine*.
Summarily. 30

You see what he suggests is *jus cogen* doesn't exist. There is
no such thing as *jus cogen* in international law, we had a lecture
on that. But at the same time he says, "*We must be bound by*
law." 35

And what does the law say? What does the other international
tribunals dispensing law say? I have already referred, in my
submission, yesterday for example, there were many cases,
the criminal tribunal for the former Yugoslavia, it says, "*jus*
cogen does not only exist but it enjoys the higher rank in the
international hierachy than treaty law and even ordinary customary
law." 40

1 law. "That's what international tribunal says. And he says,
"Doesn't exist. What is this '*jus cogens*', a Latin phrase." So, there
is no response, there's no legal response other than to just
say, "Please accept my word, this doesn't exist, *jus cogens*."

5 What is his comment on the House of Lords decision which
says that prohibition against torture is absolute, there could
be no derogation, it is accepted as a *jus cogens*, the preemptory
norm of international law from which it states cannot derogate.
10 Where is the response? There is no response, except to say
that, "No, it doesn't exist."

And then we were given a short illuminating lecture on
international law about what is binding, what is not binding.
15 And what is binding is treaty law, he says. And the United
States is a party to the Convention Against Torture. What
about that? The United Nation is the party to the Geneva
Convention, one, two, three, four. Never mind about Protocol
1 that he referred to – they are not. What about that? So these
20 are the key legal questions that must be addressed. What are
the obligations under these, accepted by the United States of
which all the accused persons are parties.

And yesterday I listed, at length, chapter and verse, I set out,
25 as to the specific Acts that have been violated, on the basis of
evidence given by the three witnesses. I talked about Article
3 Geneva Convention, infliction of cruel treatment, outrages
against personal dignity, use of weapons against prisoners,
close confinement, inadequate heating, and I quoted the
30 supporting evidence as well as the Articles; Article 21, 25, 3,
26, 12, 78, 87 (confinement without daylight, for example,
where Moazzam Begg said for 9 months he was not given,
there was no sunshine, no daylight for him), punishments,
Article 90 and so on so forth. 5 pages I listed with the
35 supporting evidence from the 3 witnesses and the Statutory
Declarations.

What is the response? As there is a Malay saying, "*bisu di
dalam seribu bahasa*." Deaf (mute) in a thousand languages.
40 No answer, no response. We are here dealing with law. We're
not dealing with here with histrionics. This is not a
performance.

And then about the techniques. Oh, we did not show the techniques. As we did we not show that there was this torture. But yesterday I went chapter and verse to show how Rumsfeld approached these techniques – These techniques which the ICRC, with the Committee on Torture, Human Rights Watch, and all the academics have decried as being a violation to the Torture Convention and a violation to the Geneva Convention. And then Rumsfeld amended the techniques to 18 techniques, which again all these organisations said were torture, but what is response on that point by the *Amicus*? There is no response.

We quoted what Bush himself said about the use of the technique, and yet we have here a suggestion that there has been no corroboration on these techniques.

These 3 accused persons had themselves very clearly, as I said in my submission yesterday, admitted to the use of these techniques that violate the Geneva Convention, the Torture Convention. And I can just pick up, at random, any chapter in, for example the book by Rumsfeld Rumsfeld, and I, on the spur of the moment looked at one of them, and he says the Abu Ghraib images – this is accused number 3 – he refers to the Abu Ghraib prison photograph and says, “*The acts were inexcusable.*” This is at page 545, I’ll make it available.

“*Many depicted military guards performing humiliating acts on Iraqi prisoners – forcing them into what appeared to be a human pyramid, with naked detainees piled on top of one another. In some photos, the guards were shown pointing, laughing, or giving a thumbs-up.*”

This is what we showed in the movie, “*Taxi to the Dark Side.*” And what is the response? They said, “*Oh, this is edited.*” Of course it’s edited. Even the movie he showed is edited. Movies must be edited. That’s the nature of the art. But we must come to the crux of the matter: Are those images real or not? Not whether it is edited or not. If there is one hour of torture and we edit it to 3 minutes of torture, it’s still torture. Editing has nothing to do with the quality or the truth of what is being stated. And we have Rumsfeld himself who says very clearly that these acts were “*inexcusable*” but, of course, he says, “*I*

1 *had nothing to do with it. It's only these lower command, and this is*
2 *the same thing that has been suggested by the Amicus."*

3 But then we have all the links that we showed yesterday
4 between the techniques, and I went chapter and verse, step
5 by step, to show how these techniques evolved from the
6 lawyers' advice to President Bush, to Rumsfeld, to Cheney;
7 and then how they were sent by the Southern Command; and
8 then how they were sent to Guantanamo, for example, to the
9 head of interrogation, and what the head of interrogation
10 himself said, *"Yes, we applied this and this had the approval of the*
11 *higher up."* What is the answer to that? What is the response?

12 Instead we have an elaborate discussion about, *"Oh, the New*
13 *York Times says that Abbas Shalal is not the man in the photo, it's*
14 *someone else, so don't believe him."* But look at what his statutory
15 declaration said. His statutory declaration said that he was
16 given this particular treatment, he was electrocuted.
17 Electrocution was applied to his genitals. He was made to
18 stand on a box. That is the crux of the matter. So does that
19 amount to torture, or does that not amount to torture? That is
20 the key question. Not the fact that, *"Oh, this man is not the one,*
21 *it's actually another person. It's another person who was torture in*
22 *the same way so, because of that, therefore, either there was no*
23 *torture, or you cannot rely on this witness."* What kind of
24 submission is that, with respect, of course. He has a difficult
25 task, and I respect that, and in his own way, have made out
26 his submission. But we cannot afford to take this kind of a
27 position where we treat with some level of flippancy the very
28 serious points that were raise.
29 30

31 And he says, *"There is no corroboration, there is no evidence of,*
32 *for example, what Abbas said."* Abbas showed you his fingernails,
33 he said, *"My fingernails were plucked by pliers."* And he showed
34 those fingernails and they were distorted, and you can look
35 at it. That was the clearest evidence that you can give. Real
36 evidence. Treat it with some level of respect. Don't just dismiss
37 it. Maybe some amount of it, you know, *"How come he did not*
38 *disclose that he was working during Saddam Hussein's time?"*
39 What's the relevance of that? He said he was a Chief Engineer
40 at the time of the occupation. You don't become a Chief
41 Engineer at the time of the occupation just on the day after

the occupation arises. Of course it has to be before the occupation, it was Saddam Hussein, the world knows that. So what you want us to do? Put in an affidavit and say, *"I was working and employed when Saddam Hussein was running this place"*? What's the relevance of that? And if it is relevant, elicit it. But don't say that failure to elicit therefore renders that testimony suspicious. That is the point.

And about the Americans. Oh, you say, *"Oh, the hood, I managed to show that they were not Americans."* But look at the totality of the evidence. What did he say? If you look at his evidence, he said, and this was not challenged, he said, *"On the evening of 20th August at about 10pm a combined force of American forces and National Guard launched a raid on my brother's house. The force consisted of 4 American Humvees filled with American soldiers and 12 truck-loads loaded with Iraqi soldiers. More than 15 American and Iraqi soldiers entered the house in a terrifying manner."* How many more Americans does *Amicus* want us to show to suggest that this was an American exercise done by an occupying force, the whole world knows it was an occupying force. What else do you want us to say? And this was not challenged. And as is trite, something that is not challenged remains on record as having been established.

And then about Jameelah. She did not tell us about the American, that she was in an American base, she didn't identify the base – she did. There were 2 bases there, one is an American base, one is a military base. And she was in an American base. And so what is the conclusion? And there are English-speaking people in an American base, it must be from America. That's the logical inference. What's so difficult for *Amicus* to understand that?

And they said, *"Oh, Moazzam Begg, he did not tell us that he owned a book shop. He did not tell us a variety of things."* And so what? That discounts his evidence of torture? That gentleman went through 3½ years of torture in Guantanamo Bay where the techniques formulated through the lawyers, the 4th to 8th accused, which were approved by Rumsfeld in his own handwriting, as we showed, those were the techniques that were applied and we showed it, a pattern, a consistent pattern,

1 through all the witnesses, including through the statutory
declarations.

5 Of course the statutory declarations, the learned *Amicus*
suggests that, "*Oh we could not cross-examine the 2 witnesses.*"
Of course you can't, that's a statutory declaration and they
were not present. But what is the quality of the cross-
10 examination that you could have seen as derived and inferred
from the 3 earlier witnesses? And you can elicit evidence, but
don't dismiss the fact of the acts that were inflicted upon,
Moazzam Begg for example, by the fact that he did not give
his whole history. If you want his whole history, he's written
15 a book on it – Enemy Combatant – buy the book, Amazon.com,
all his story is there, from the day he started out in the United
Kingdom, what happened to him there, what happened when
he then went to Afghanistan and then went to Pakistan, so on
so forth. So there is really no response in terms of the quality
of evidence that has been tendered by our 3 witnesses.

20 So, it is our submission that when we look at the *totality of*
the evidence, leaving out the little point, with respect, that
had been made to discount that evidence, that we have proved
beyond reasonable doubt, because the core of the evidence
that we have has not been assailed by learned counsel for the
25 defence.

30 So we say our case remains un-assailed, and that we that have
proved beyond reasonable doubt that all 8 accused were
involved. These are very serious allegation we have made.
They all had knowledge of this. They had knowledge on the
fact that these abuses were going on, and yesterday I was at
pains to show how that knowledge came about, by referring
to Human Rights Watch letters that were written to the 1st to
3rd accused, letters that were written, confirmation by ICRC
35 as to the treatment.

Also the fact that all these information was in public domain;
and, even I have read Rumsfeld own contention now, that
they even said, "*that these are inexcusable acts.*"

40 All these acts were contrived. They formulated techniques
that were violating the Torture Conventions, Geneva

Conventions, *jus cogens*, customary international; and our 1
 earlier contention that the charges have been proven beyond
 reasonable doubt – there should be a conviction.

On the legal question of whether torture is a crime under 5
 international law, I leave it to Professor Boyle now to address
 and I thank the Tribunal. Thank you very much.

Francis Boyle:

Your Honours, may I suggest we take a brief recess before I 10
 conclude the rebuttal for the prosecution?

* * * * *

10 May 2012 – Session 2 15

Registrar Musa Ismail:

All rise. 20

Francis Boyle:

Your Honours, may it please the court, I am simply here to
 deal with remaining legal issues left over from the
 presentation from the presentation of the *Amicus-Defence's*
 case. 25

At this time, I would like to introduce into the record another
 article by Professor Jordan Paust entitled "*The Absolute
 Prohibition of Torture and Necessary Appropriate Sanctions.*" This
 is dated Summer 2009 for the proposition that whatever might 30
 have changed after 9/11, it was not the prohibition against
 torture. This is a very learned, comprehensive analysis, printed
 as of 2009, on why the prohibition on torture remains absolute
 under all conceivable circumstances.

And I repeat that Professor Paust, my colleague, my friend, is
 one of America's leading expert on the laws of war. He was
 the military lawyer for the Pentagon during the Vietnam War
 in charge of investigating war crimes – so, of course, he knows
 of what he speaks. Professor Paust affirms, in this lengthy 40
 article, with citations that I will not review here, that even
 after 9/11, the prohibition on torture remains absolute.

1 And let me point out, even during the darkest days of
the Vietnam War, when Professor Paust was investigating war
crimes allegations, no one in the United States government
argued any right to torture anyone. Indeed, when it came to
5 the "VietCong" whom the United States government
considered to be insurrectionists, if not terrorists, nevertheless
the Pentagon concluded that it would apply full-scope
protections under the 3rd Geneva Convention as prisoners of
war to captured VietCong guerrillas – the famous MAC-V
10 decisions, Military Assistance Command Vietnam.

So there was no excuse for what was done to anyone after 9/
11 and that still remains the official position of the United
States government today, and especially the United States
15 military. And I will review those sources momentarily.

But let me go through some of the submissions made by
defence-amicus.

20 First, on paragraphs 10, 11, 12, and 13 as to precisely who was
doing the torturing: As I pointed out in my essay that I
submitted to you yesterday, "*Iraq and the Laws of War*," the
United States government was the belligerent occupant of Iraq
under the laws of war subject to Hague regulation of 1907
25 and the four Geneva Conventions of 1949, and this obligations
was enshrined and ratified by the United Nations Security
Council in repeated resolutions that the United States
government would be bound at all times as the belligerent
occupant in Iraq under the Geneva Conventions and the
30 Hague Regulations.

What the United States of America government did then was
to set up a puppet regime in Iraq to administer Iraq. Under
the laws of war, the United States could set up a puppet
35 government, a puppet regime, if it wanted to, to administer
Iraq; but US Army Field Manual 27-10, that I have mentioned
yesterday, that is still valid and binding, that is cited in my
article, paragraph 366 says,

40 *"Restrictions placed upon the authority if a belligerent
government [here the United States] cannot be avoided by a
system of using a puppet government, central or local, to carry*

outacts which would be unlawful if performed directly by the occupant. Acts induced or compelled by the occupant are nonetheless its acts."

So even to the extent some torture might have been inflicted by Iraqi Forces working for the US puppet government, these acts are nonetheless the acts of the belligerent occupant, the United States government itself, and that is paragraph 366 of US Army Field Manual 27-10.

And, by the way, just before I came out here, I communicated with the top lawyer in the Pentagon in their Humanitarian Law Division as to the status of US Army Field Manual, and he assured me it is still valid, it is still binding on United States armed forces. They are considering a multi-branch service manual that would apply to all branches of US armed forces; air, sea, and land; but that manual is still in the bowels of the Pentagon somewhere and has not yet been authorised or approved. Until it is, this manual is the law, and the international law of land warfare, as interpreted officially by the United States government itself.

We saw this video by Michael Moore – fine – as we know, the original conditions at Guantanamo was horrendous, including torture all up and down, inferior medical treatment, indeed no medical treatment for wounds and other injuries, medical experimentation on the victims supervise in part by doctors and psychologists, also war crime. The people at Guantanamo were protected by the Geneva Conventions, either the 3rd Geneva Convention or the 4th Geneva Convention, or Common Article 3. And yet they were abused medically.

As a result of the abuses and the adverse publicity coming out, slowly the Pentagon upgraded the type of medical treatment that was given to the victims at Guantanamo. There however, the standard of treatment is not healthcare as provided in the United States of America – which is deplorable for the vast majority of the American citizens – rather, the appropriate standard of healthcare for the people at Guantanamo is determined by the 3rd and 4th Geneva Conventions, which is the highest standard of medical healthcare one can envision. And yet, despite that, it is still

1 the case today, even under the Obama administration, that
the United States government refuses to apply the 3rd and
4th Geneva Convention to Guantanamo – and these are war
crimes.

5 *Amicus* defence counsel mocked this notion of “command
responsibility”. Well, he’s free to do that if he wants. But that’s
not the way the Pentagon sees it. Right? They’re the experts.
It’s only fair to take their law and apply their law to their own
10 conduct of armed forces.

Defence *Amicus* can mock command responsibility all he
wants. And can mock Nuremberg, mock Tokyo. Fine. But he
cannot mock the Pentagon’s own interpretation of command
15 responsibility which they believe applies to themselves. And
again, this is from US Army Field Manual 27-10, still valid,
still binding. Every officer in United States armed forces is
charged with knowledge of Field Manual 27-10, and those
officers also have an obligation under the Hague Regulations
20 and the Geneva Conventions to educate the enlisted men
under them as to the rudimentary requirement of 27-10.

What does the Pentagon itself say about command
responsibility?

25 In some cases, military commanders may be responsible for
war crimes committed by subordinate members of the Armed
Forces or other persons subject to their control. “*Other persons
subject to their control*” would mean CIA, mercenary
30 contractors, even Iraqis, under this situation of belligerent
occupation which the United States government voluntarily
assumed.

To continue the relevant portion,

35 *“Such responsibility arises directly when the acts in question
have been committed in pursuance of an order of the
commander concerned.”*

40 We have established that the Orders to commit torture came
directly from President Bush, Vice-President Cheney,
Secretary of Defense Rumsfeld, and right down the chain of

command. That's indisputable. The order by President Bush, a presidential order, to strip Al-Qaeda and Taliban of their rights under the Geneva Conventions, and then these enhanced interrogation techniques, which are a euphemism for "torture", came right from the top all the way on down. We are dealing here not with the low-level American soldiers that you saw in the video. We are dealing with the organisers and the ring-leaders, and the aiders and abettors, and the conspirators. That's the purpose of this Tribunal, just like the International Criminal Court. The International Criminal Court is not there to deal with the low-level soldiers, but the heads of State, heads of government, ministers, and other responsible government officials.

Let me continue and conclude Field Manual 501 on command responsibility. This is the Pentagon's own interpretation. It applies to President Bush in his capacity as Commander-in-Chief of US Armed Forces, Vice-President Cheney, No. 2, Secretary of Defence Rumsfeld in the Pentagon; and then everyone straight on down that chain of command,

"The Commander [Bush, Cheney, Rumsfeld] is also responsible if he has actual knowledge [and in this case they had actual knowledge] or should have knowledge through reports received by him or through other means, that troops or other persons subject to his control, are about to commit, or have committed a war crime, and he fails to take the necessary and reasonable steps to ensure compliance with the law of war or to punish violators thereof."

Now that's their own Field Manual. That test was taken from the decision by the United States Supreme Court itself in *Re Yamashita*. It's their own law. The Pentagon does not deny at all that this is the law. Indeed, I've been repeatedly qualified as an expert on the laws of war in 5 US military court martial proceedings, and had testified as to the contents of US Army Field Manual 27-10. They have never ... it, the applicability of the ... Manual in US military court martial proceedings, because they can't. It's their law.

And it is correct, that the Pentagon protested publically of this sensationalist FOX TV series "24" promoting torture

1 because it was inconsistent with their publicly pronounced
condemnation of torture.

Why?

5 Because originally, as the Pentagon understands, the laws of
war were, first and foremost, designed to protect their soldiers,
that's why. That's what the laws of war came from. The notion
10 that this is some wide-eyed idealistic utopian exercise is
preposterous. The laws of war are drafted by military law
experts and professionals of international law.

My teacher, Judge Baxter, who drafted US Army Field Manual,
15 was a Major in the Pentagon, and then later rose to the rank
of Lt-Colonel, and helped draft Geneva Protocol 1 on behalf
of the United States government. These laws of war are drawn
up by the military, first and foremost, to protect military
20 personnel. And then later, when we all saw the atrocities
inflicted by the Nazi regime in World War II, and especially
on the eastern front, it was decided that we needed separate
protection by name for civilians. And that became the origin
of the 4th Geneva Convention of 1949 – protecting civilians
by name.

25 And as we saw in the 3 witnesses we had, they were all
protected persons, civilians, and their rights were sacred under
that Geneva Convention. They had more rights, as protected
persons, than you or I have at the time they were protected
30 persons. And those rights were grievously violated, grave
breaches of the Geneva Conventions, serious war crimes that
created universality of jurisdiction by anyone to prosecute
the perpetrators.

35 And let us get back to the jurisdiction exercised by this Court,
which we discussed at the outset of these proceedings. You
have universal jurisdiction and, indeed, an obligation to
prosecute, adjudicate, international crimes under international
law.

40 Indeed, it's not just the Pentagon that agrees with this position.
It is also the United States Supreme Court itself, in the Hamdan
decision. Who is entitled to interpret the United States

Constitution? It's not this Mr. Paulson. It's the United States
Supreme Court, under Marbury v. Madison, the United States
Supreme Court has the ultimate authority to interpret the
United States Constitution which mentions, expressly in
Article 6 of the Constitution, that treaties are the supreme law
of the land.

And also, in the very famous case of Paquete Habana, 1899,
the United States Supreme Court ruled that "*customary
international law*" is part of United States law, United States
common law, the common law of the federal government of
the United States of America and all states of the union. So
defence-*amicus* can mock customary international law all he
wants, but that is not the way the United States Supreme Court
sees it. And who is better qualified to interpret the
requirements of the US Constitution? Defence-Amici or the
United States Supreme Court?

And I'm licensed to practice law before the United States
Supreme Court, and have been, since 1984, and an attorney
licensed to practice law before that, since 1977. So the United
States Supreme Court agrees with me. And in the Hamdan
decision, they ruled that despite that this bogus category of
"*unlawful enemy combatant*," for which there is no basis in
post-World War II international law, they rejected it and ruled
that Common Article 3 of the 3rd Geneva Convention of
1949 applied to Al-Qaeda and Taliban at a minimum, without
getting to the maximum arguments, they said, at a minimum;
and as I pointed out yesterday, Common Article 3 clearly
prohibits torture and outrages on personal dignity and other
cruel, inhumane, and disgusting treatment, and also requires
that the wounded and sick be cared for.

And we have submitted to the Court numerous instances
where wounded and sick were tortured, and their wounded
and sick condition was taken advantage of and exploited to
try to get information from them, admissions, that could then
be used for other purposes, in particular, one of which, to
somehow incriminate Iraq for what happened on 9/11 when
everyone knew that Iraq had nothing to do with it. They were
trying to concoct a bogus case for war against Iraq on the basis
of tortured evidence from the victims here to do that. And

1 we've already explored that in the last charge where you found
Bush and Blair guilty of a crime against peace beyond a
reasonable doubt.

5 Defence-Amici makes fun of Nuremberg. Well, Nuremberg
was the idea of President Franklin Roosevelt. Churchill
wanted to take out the top 5,000 Nazis and shoot them dead.
Stalin felt the same way and wanted to shoot more. It was
10 President Franklin **Roosevelt** of the United States of America
who took the position, *"No, we had to afford the top Nazi leaders
due process of law. Otherwise what would be the difference between
them and us? And why, then, did we fight this war?"*

15 So it was the idea of the United States of America to have the
Nuremberg tribunal. The Nuremberg Charter was drafted by
United States lawyers. There is a recent book on this by a
journalist named Persico(sp?) going through the origins of
the drafting of the UN Charter by United States lawyers.

20 Yes, Nuremberg has been criticized as victor's justice, and we
can debate that. But one of my friends, the late, great, Mary
Kaufman was a prosecutor at Nuremberg, a lawyer. She
prosecuted the I.G. Farben case; and she once told me in work
that we did together that at Nuremberg,

25 *"we did not necessarily think just the Charter itself was
international law, binding the entire world, nor did we think
that the judgment itself was international law, binding the
entire world. But when the United Nations General Assembly
30 adopted a unanimous declaration affirming the principles of
the Nuremberg Charter and Judgment for the entire world,
then we at Nuremberg believed that the work we had done
became customary international law."*

35 And that date was 1946. And as I've said, the United States
government agreed with it, and that is why Professor Baxter,
my teacher, put the Nuremberg principles into US Army Field
Manual 27-10 where they are still today, as recently affirmed
40 to me a few weeks ago by the top Pentagon lawyer dealing
with these precise issues.

So we have a continuity of law from at least 1946 up until today without any changes at all. Indeed, just recently, the Pentagon issued a new publication – Joint Publication 1-04: Legal Support to Military Operations – dated 17 August 2011. And what does this say, in part? 1
5

Chapter 2, *"Law of War Principles – It is Department of Defence policy that members of the Department of Defence components comply with the laws of war during all armed conflicts, however such conflicts are characterised, and in all other military operations."* 10

So notice, they dealt directly with all these equivocating, and cavilling, and lying by the Bush lawyers, whom we have considered today, to make it clear there was no doubt ... all elements of the Department of Defense comply with the law of war during all armed conflicts, that includes this so-called *"War on Terror,"* however such armed conflicts are characterized: War on Terror, insurgency, outright warfare, however you want to call it. It says that right here. This is as recent as this summer, August 2011. And in all other military operations, the laws of war apply. 15
20

So notice, even as the Pentagon sees it, the laws of war, including absolute prohibition on torture, have not changed since 9/11. Indeed, one of these principles, I won't go through it all here. The *principle of "unnecessary suffering"* forbids, *"the employment of means and methods of warfare calculated to cause unnecessary suffering."* 25

Well of course that's torture, cruel, inhuman, and degrading treatment. The Pentagon has been consistent on this point. The United States government has been consistent on this point, at least since the time of Nuremberg, the Nuremberg Charter, August 8, 1945, until today. And 9/11 has not changed the laws of war. 9/11 has not changed the absolute prohibition on torture for any reason, as pointed out by Professor Paust in the article I just gave you – a former military lawyer himself. 30
35

The only source of authority Defence-Amici cites is Mr. Paulsen. Well, what can I say. If you look at the defence bundle, this article by Mr. Paulsen which he cites, it's Defence Volume 40

1 3, page 1762, Yale Law Journal article. In the footnote, *"My*
2 *thanks to those who reviewed and commented on part or all of a*
3 *draft version of this Essay,"* including Robert Delahunty. Robert
4 Delahunty is one of the war criminal-torture lawyers who is,
5 and was, a colleague of Professor Yoo. He's in the documents
6 we have submitted to you. We have not singled him out in
7 particular as one of the ringleaders with Professor Yoo, but
8 he worked with Professor Yoo and drafted several other
9 memos, as you can see in the schedule prepared in the bundle
10 of the memos, Delahunty is there. So this fellow Paulsen
11 teaches with this war criminal Delahunty, this torture lawyer,
12 and is now thanking him for all his fine comments on his
13 article. Delahunty was just a big a war criminal and a torture
14 lawyer as Yoo. And this fellow Paulsen is thanking him.

15 This shows you the degradation and corruption of American
16 legal education that has happened in the United States of
17 America after 9/11 where you have a war criminal and torture
18 lawyer like Delahunty teaching at St. Thomas Law School
19 along with this fellow Paulsen, and Professor Yoo teaching at
20 the University of California Berkley Law School, and his
21 colleague, Professor Goldsmith, another torture lawyer and
22 war criminal, teaching at Harvard Law School. This is going
23 on all over American legal education, and now they are citing
24 each other as authority – one war criminal citing another war
25 criminal, one torture lawyer citing another torture lawyer as
26 authority – and they're all thanking each other and scratching
27 each other on the back.

28 The same thing if you look at 1762, he also thanks Nicholas
29 Rosenkranz. Nicholas Rosenkranz worked for Professor Yoo
30 at the Department of Justice drawing up all these memos. He
31 applied for a job at our law school. I saw his resume. He listed
32 Yoo as his reference. A war criminal vouching for another
33 war criminal and torture lawyer. And of course I did
34 everything humanly possible to make sure we didn't hire
35 Rosenkranz. Unfortunately he went to work for Georgetown
36 Law School. And it just shows you the rot, decay, and
37 corruption of American legal education that has happened
38 after 9/11 where torture lawyers and war criminals get hired
39 by some of the top law schools in America.
40

And here we have Paulsen thanking two of them for their fine contributions to his article. Excuse me, I think it's not worth anything, and the very fact he's saluting two war criminals and torture lawyers gives you a pretty good idea of his mentality and ... he's in cahoots with them.

So why would this Tribunal pay the least bit of attention to Paulsen who's in cahoots with two war criminals and torture lawyers? With all due respect to the Tribunal, I certainly hope you do not, and I do not expect you, to stoop to that level.

This concludes the rebuttal by the prosecution. But let me state, we believe that we have proven the defendants guilty beyond a reasonable doubt, both on the facts and the law. There is no excuse or exception for torture, even as recognised by official, binding documents of the Pentagon itself that is in charge of making war for the United States government, and as recognised by the United States Supreme Court itself in the Hamdan decision. And as Kennedy J said in his separate opinion in the Hamdan decision, *"violation of the Geneva Conventions is a war crime in violation of the United States War Crimes Act itself."*

So how could this Tribunal find anything less than what the United States Supreme Court has also found, and what the Pentagon has also ruled, and currently rule, to be the law applicable to all its armed forces. I submit the answer is clear. You must find these defendants guilty as charged.

Thank you Your Honours.

Judge Lamin Mohd Yunus (President):

Before we make a decision on the case, I would like Professor Nijar and Jason to say something on the admission of the video – where would we place it in the proceedings. Should it be part of the proceedings or not, because it is a question of admissibility also, is in point for the video. Would you like to say something for both of you? I did mention yesterday.

Jason Kay Kit Leon:

Well, the video evidence is secondary evidence. The maker of the video is not called to testify on it. The entire video

1 contains various hearsay allegations, and although one of the
participants of the video, Moazzam Begg, is still with us today
but he only occupies a very small portion of that one hours
plus video.

5 Strictly speaking, yes it should be inadmissible, but the rules
of the Tribunal do allow for secondary and hearsay evidence.
That is all I can say. The reason I put in the Guantanamo video
is to negate the facts of the prosecution's video, and also to
10 make the point that both **videos are highly edited**. It has a
narrative. It is not a verbatim record of anything.

15 Usually when audio or video evidence is presented in court,
the maker is there to say, *"I recorded this from this time to this
time, I was there, this was what I did to do it, this is it, this was the
original copy, I kept it for a long time, it was sealed, it was in my
possession,"* to show the chain of evidence is there.

20 This video is a movie. It's a narrative, and strictly speaking
from the very very very strict rules of evidence, yes, it should
be not be admissible; but I leave it entirely to the hands of
Tribunal. I do not wish to make any application on it.

Judge Lamin Mohd Yunus (President):

25 Merely to entertain us?

Jason Kay Kit Leon:

30 The prosecution put it in ... I did not object because I realise
this Tribunal is important, and again, I reminded myself before
the start of proceeding on Day 1 that I am not to be a 'defence
counsel' in the strictest sense where I jump up and down to
object for every single little thing, but to just give, to help, the
Tribunal, just to see, maybe the other side.

35 ***Both video evidence, strictly speaking, should be out. All video
evidence should be out, strictly speaking.***

I'm sorry, I have nothing more than this.

40 Gurdial Singh Nijar:

Your Honours, I think this is a very unique case because it is
a case where we have witnesses but we do not have the benefit

of actually seeing, going, for example, to Guantanamo or Abu Ghraib to see the conditions that are prevailing there. 1

We also cannot have further verification of what actually transpired in those places when we talk about nudity, hanging, and so on so forth. So the primary evidence was through the witnesses when they narrated specific kind of treatment they were meted. However, as I suggested yesterday, it's very difficult in the detached conditions of these salubrious surroundings to get a clear depiction of what actually transpired and whether or not what was being suggested by each of these witnesses was true or not. 5 10

So, the next best thing to do is what? We can either remain silent or, in the interest of justice, to give a clearer picture as to the images that constituted the acts that we are complaining about, in fairness to the Court, because we must see some of that. And so – we are not interested in the narrative – I think the video was far too long, in fact we should have edited it more, because all we wanted to show was those parts, as well as what was being taken out of the mouth of Rumsfeld, of President Bush, and so on, who are the accused in this case. 15 20

So that was the purpose, the objective. All that we ask is that we just bear in mind those facets of the video dealing with the torture and those comments and statements trying to exonerate themselves, of Bush and Rumsfeld. 25

As to its admissibility – this is a very difficult trial, because we can't have a *locus in quo*, for example, or we can't go back to that time when these incidences were complained about. So we're not really interested in the taxi driver as such, but we're interested in those images in the prison. So that was the objective, in the interest of justice. 30 35

And now we come back to Article 24 of the Rules of Procedure and Evidence of the Tribunal relating to admissibility, at page 41, it says,

"Secondary and hearsay evidence may be admissible in the interest of justice in particular circumstances ..." 40

1 So that is the point: Is it in the interest of justice, and is this a
particular circumstance? If these two criteria are satisfied, then
hearsay evidence may be admissible, depending upon the
discretion of the Court.

5 Then the second part is: What kind of weight to attach? It
says here,

10 *"... the Tribunal shall accord secondary and hearsay evidence
less cogency and shall decide finally on the total weight of the
evidence with due regard being given to primary evidence."*

15 So we are entirely in your hands to apply this. Less cogency,
we are not using it as primary evidence, we just illustrate it, if
you like, of the situation, and it should be accorded less
cogency than the primary evidence, and take into account the
total weight of the evidence, the cumulative weight of the
evidence.

20 So in that regard, first, we say, under Article 24, it is admissible,
and Your Honours are at liberty to choose such portions of
those, and we invite that the narrative be disregarded; and to
attribute to it, so on the question of legal admissibility, Article
24 allows it, and at the same time we agree that it should not
25 be the primary basis upon which the conviction should be
based. It should be taken into account as supportive, as
illustrative at best, and be placed in the appropriate corner of
the totality of the weight of the evidence.

30 Having said this, we have no objections to the admissibility
of the videos that were presented by the defence either. Thank
you very much.

Registrar Musa Ismail:

35 The court adjourns now to 12.15pm. All rise.

* * * * *

10 May 2012 – Session 3

1

Judge Lamin Mohd Yunus (President):

Ladies and gentlemen, we have looked at Article 24 on the admissibility. We find that the content of it is highly prejudicial and therefore we have it struck out – both videos. Other than the maker is not here, it is highly prejudicial. 5

Next is the evidence of the case. We are unanimous that there is a *prima facie* case as per the charge. I wish to ask Mr. Jason, what do you propose to do? 10

Jason Kay Kit Leon:

I rest on the submission. The submissions were made as final submissions. 15

Judge Lamin Mohd Yunus (President):

Professor Nijar, he is resting on submission. 20

Gurdial Singh Nijar:

Yes, Your Honour. As I submitted, *Amicus*-Defence did not submit “*no case to answer*” at the conclusion of the case of the prosecution team. And then we proceeded to make our submission on the basis that there was a *prima facie* case, and now Your Honours have ruled that there is a *prima facie* case, he’s resting on his submissions, which means there are no witnesses, and all we can do is repeat the submission we had yesterday as our final submission; and *Amicus* has already given indication now that that was his final submission as well. 25 30

So now we leave it to Your Honours to decide on the outcome of the case based on the fact that the evidence and the submissions constitute the final submissions at the end of the case. 35

Judge Lamin Mohd Yunus (President):

In that case, thank you very much both of you. We think we have actually the whole afternoon. We would prefer to come back here at 9 o’clock tomorrow morning. 40

1 **Registrar Musa Ismail:**

The court is adjourned now. We shall resume tomorrow, 9am.
Court rise.

5 [Registrar a few minutes later informs that the Tribunal will sit at
4.00pm on 11th May 2012]

10 * * * * *

11 May 2012 – Session 1 (JUDGMENT)

15 **Judge Lamin Mohd Yunus (President):**

Ladies and gentlemen, we have heard the evidence, and we
are unanimous in our finding that the prosecution has proven
its case beyond reasonable doubt, and we therefore found **all**
the accused guilty as charged.

20 And I shall now read the grounds of judgment.

All the 8 accused were charged with the crime of torture and
war crimes in that –

25 I. The Accused persons had wilfully participated in
the formulation of executive orders and directives
to exclude the applicability of international
conventions and laws, namely the Convention
30 against Torture 1984, Geneva Convention III 1949,
Universal Declaration of Human Rights and the
United Nations Charter in relation to the war
launched by the US and others in Afghanistan (in
2001) and Iraq (in March 2003);

35 II. Additionally, and / or on the basis and in
furtherance thereof, the Accused persons
authorised, connived in, the commission of acts
of torture and cruel, degrading and inhumane
40 treatment against victims in violation of
international law, treaties and aforesaid
conventions

The indictment against the 8 Accused persons also sets out the particulars of the charge in paragraphs 1 to 22, of which paragraph 7 states that all the accused persons "are individually responsible for the crimes alleged against them" under the charge and that they "*planned, ordered, committed, otherwise aided and abetted in the planning, preparation, or execution of these crimes*". None of the Accused persons personally participated in actual acts of torture or inhumane treatment of the victims but facilitated and directed the implementation of torture and inhumane treatment through the issuing of memorandums, legal opinions and directives to, among others, their subordinates. They also did not prevent the commission of these acts after knowing or being in a position to know of the perpetration of such acts and treatment.

In paragraph 5 of the particulars of the charge, it is stated that the United States is, and was at all material times, a party to the Torture Convention 1984 and the Geneva Conventions including Geneva Convention III 1949.

In paragraph 6 it is stated that the first accused, as Commander in Chief of the Armed Services, he exercised authority, direction and control over the entire Executive Branch.

In paragraph 7 it is stated that all the Accused persons are individually responsible for the crimes committed against them under this charge. The Accused persons planned, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of these crimes.

In paragraph 8 of the particulars of the charge, it is stated that the 4th to the 8th Accused persons were complicit in that they provided the legal opinions and justification for avoiding the obligations under the Convention against Torture 1984 and the Geneva Convention III of 1949, thereby facilitating the implementation of torture and inhuman conduct when it was plain that the advice they were giving was erroneous in law. They also knew that their advice, if accepted, would be acted upon.

1 In paragraph 9 it is stated that the first three named Accused
persons were at all material times superiors and had
authorised the commission of acts in violation of the aforesaid
5 Conventions, and in any event they knew or had reason to
know that their subordinates were about to commit such acts
and had done so, and they had failed to take the necessary
and reasonable measures to prevent such acts or to punish
the perpetrators.

10 Paragraph 10 sets out the authorizations issued by the first
accused, with knowledge of the second accused.

15 Paragraph 11 sets out the authorization issued by the third
accused person.

20 Paragraph 13 states that the first and second accused persons
were aware of the memos, approvals and directives as
aforesaid and that they would be, and were in fact, acted upon.
They failed to intervene to prevent any illegal activity
conducted under these memos and approvals.

25 In paragraph 13 it is stated that the legal opinions mentioned
in paragraph 8 were relied upon by the first three named
Accused Persons and then translated into memos and
directives which they issued to persons in charge of dealing
with detainees at prisons run by, or under the supervision of
US and its officials.

30 In paragraph 14 of the particulars of the charge, it is stated
that as a result and on the basis of these authorizations by the
first to the third Accused Persons relied upon the legal
opinions of the 4th to the 8th Accused Persons, war crimes
(that is, acts of torture and brutal, barbaric, cruel and
dehumanizing acts) were perpetrated against, amongst others,
35 the following named victims (detainees) –

(a) Moazzam Begg of the United Kingdom (detained
from January 2002 to January 2005);

40 (b) Rhuheel Ahmad of the United Kingdom (detained
from end of 2001 to March 2004),

- (c) Ali Sh. Abbas of Iraq (detained from October 2003 to March 2004); 1
- (d) Abbas Abid of Iraq (detained from August 2005 until September 2006); 5
- (e) Jameelah Abbas of Iraq (detained from January 2004 to June 2004). 5

In paragraph 15, it is stated that the detainees were subjected to a systematic pattern of abuse in the execution of these acts of torture in various detention centres. 10

In paragraph 16, it is stated that the detainees were subjected to severe physical and mental pain, and cruel, inhuman and degrading treatment over long periods. These acts of torture etc. were designed to force the above detainees to confess to "crimes" they had no knowledge of, and / or were not involved in. 15

In paragraphs 18 and 19 of the charge, it is stated that these acts of torture are in contravention of the Universal Declaration of Human Rights and the Convention Against Torture 1984. These acts also constitute cruel, inhuman and degrading treatment in contravention of Geneva Convention III of 1949 on the treatment of combatants and civilians in any armed conflict and are applicable to interrogations. 20

In paragraphs 20 and 21 of the charge it is stated that the victims (detainees) were detained without just cause. No due process of the law was applied. They were not allowed access to justice including to legal counsel or courts of law. They were not charged in a court of law for any offence. 30

None of the 8 Accused persons was present at the trial although all of them had been duly notified of the charge against them in accordance with Chapter III Article 6(a) of Part 2 of the Rules of Procedure and Evidence of the Tribunal. 35

As provided for under Article 15 of Chapter V of the Charter, all the Accused persons were represented by *amicus curiae*. 40

Preliminary Objection

Before the prosecution began its opening statement, the *amicus curiae* filed a preliminary objection to the Tribunal's jurisdiction to hear this case against all the accused persons.

The substance of the preliminary objection was that the Tribunal is a creature of a Malaysian statute and can only hear cases which are governed by Malaysian law or by treaties of which Malaysia is a signatory. The crimes of which the accused had been charged are not found in any Malaysian Law nor subject of any treaties of which Malaysia is a signatory.

In reply the prosecution submitted that the Kuala Lumpur War Crimes Tribunal is a tribunal of conscience exercising universal jurisdiction. Its jurisdiction to hear crimes against peace, war crimes and crimes against humanity are provided expressly in Article 7 of the Charter.

Article 4 of the Charter expressly states that the Tribunal has international legal personality and shall have such legal capacity as may be necessary for the exercise of their functions and the fulfilment of their purpose.

Having considered carefully arguments by both sides, the Tribunal ruled that it has jurisdiction to hear the charge against the accused and dismissed the preliminary objection.

Prosecution's case

The prosecution made an opening statement indicating that he would call 3 witnesses who had formerly given testimony before the Kuala Lumpur War Crimes Commission and thereafter would submit statutory declarations of two witnesses who could not attend the hearing due to safety issues.

First Witness

The prosecution's first witness, Abbas Abid, a 48 year old engineer from Fallujah, Iraq, testified that he was abducted by a combined force of American forces and National Guard

on August 28 2005 and then taken to the Al-Muthanna Brigade headquarters (where he was detained for 4 weeks) and later taken to the Al-Jadiria prison. On September 5, 2006, he was brought to a court where the Judge ruled that he should be set free for lack of evidence. He was subsequently released on October 2, 2006.

In his testimony, the witness said that he was tortured by his tormentors in various manner – such as being subjected to electric shocks in various parts of his body especially his genitals, hanging him from the wall with hanging weights from his genitals for long periods, threatening to sexually abuse his wife and mother after bringing them to prison, forcefully extracting his fingernails, handcuffing his hands to the back and then being hung from the wall for long hours until he fainted, etc. He also testified that a bag was placed over his head for over two months and that it was removed only when he was given food. He also testified that other detainees had similar bags over their heads for over 5 months. He also testified that no medical care was available to the detainees, and that some detainees were left to die from their injuries as a result of the torture done to them.

Second Witness

The prosecution's second witness, Moazzam Begg, 41 year old British citizen, testified that he was abducted from his house in Islamabad, Pakistan, on January 31, 2002. A group of armed men in civilian clothes stormed into his house, shackled his hands behind his back, placed a hood over his head and took him to a waiting vehicle. He was then brought to a place where he was interrogated by Americans in civilian clothes. They questioned him why he was in Pakistan and Afghanistan. There were no specific allegations made against him. After being held captive in Pakistan for 3 weeks, he was moved to a US military airbase in Islamabad. The moment he was placed under US military custody, he was shackled, hooded, choked and thrown to the floor. He was carried on board a plane, strapped down over the ankles and thighs, punched and kicked, a knife pointed to his throat and threatened that his throat would be slit if he spoke out.

1 He was flown to Kandahar in Afghanistan, dragged out of
the plane and thrown into the mud, kicked, punched and
choked with his hood. He was taken to a processing area where
5 he was continuously abused by soldiers. He was then taken
to a tent where he was interrogated by two FBI officials. They
asked him when was the last time he saw Osama bin Laden
and Mullah Omar. The witness replied that he did not know
them. He was detained in Kandahar for 6 weeks before he
10 was moved to Bagram airbase, which was actually an airport
warehouse. He was not allowed to talk, walk, stand or make
any movement whatsoever.

The witness was detained in Bagram for 11 months, where he
was intensely interrogated by the CIA, FBI and US military
15 intelligence. His legs and arms were hog-tied, and was
threatened that he would be sent to Egypt. Conditions in
Bagram were extremely poor. Medical care was dependent
upon the level of co-operation of the detainees.

20 In February 2003 the witness was taken to Guantanamo Bay.
During the 20 hour journey from Bagram to Guantanamo Bay,
the witness was shackled in a "three-piece suit" of chains. A
face mask was placed on his face, together with blackened
goggles and ear muffs. The journey was very painful and the
25 witness pleaded for a sedative from the soldiers, which was
given.

At Guantanamo Bay, the witness was taken to camp Echo, a
maximum security detention centre, and placed in solitary
30 confinement. He remained there for 20 months, during which
time he was subjected to various forms of torture.

The same interrogators who had earlier threatened to send
him to Egypt (when he was questioned by them in Bagram)
35 later met him in his cell and threatened that if he did not sign
a document which they had showed him, he would either
face a summary trial which could result in execution, or he
would remain in Guantanamo Bay for decades without access
to anyone and without legal process. The witness said that he
40 then signed the document, after which he was treated a little
better but nevertheless remained in solitary confinement.

The witness stated that his mental state was severely affected as a result of the long periods of solitary confinement. He was given drugs to treat his depression, which he took but as a result he experienced hallucinations. In November 2004, he was removed from solitary confinement and placed in the other blocks with the other prisoners. Two months later he was released.

Third Witness

The prosecution's third witness, Jameelah Abbas Hameedi, 57 year old woman, now living in Damascus, Syria, was the Head Chief of the Co-operation Unions in Kirkuk when she was abducted by American soldiers from her home on January 13, 2004. She was told that she had provided monetary assistance to the resistance.

The witness said that she was dragged by her hair out of her house at 1 am, her hands tied behind her back with wires, wearing only her night clothes. It was then the height of winter. Her home and all its contents, including her car, were completely destroyed by the soldiers.

Her head covered with a hood, the witness was then pushed into a military vehicle, where again she was kicked and treated as an animal. Soon after, she was dragged out of the vehicle and placed in a detention centre – which she subsequently discovered was part of the Kirkuk military airport.

She was then interrogated by an American in civilian clothes who wanted to know about her relationship with the Baath party. She was accused of being part of the resistance, which the witness denied.

From her detention centre at the Kirkuk military airport, the witness was later taken to another detention centre which she later came to know as being the Baghdad Airport.

The witness testified that when she was interrogated by a black American female soldier, her clothes were removed and she was asked to sit on her knees and hands. Icy water was poured on her and she was asked to crawl from one side of the wall

1 to the other. A plastic tube, with a piece of wood inserted into
the tube, was used to beat her. When she dropped to the floor,
she was kicked and she started bleeding on her shoulders,
back, arms and legs. She was tortured in this fashion for many
5 hours.

She was taken to her cell and was asked to stand straight.
When she leaned on the wall, she was beaten. Her wounds
were not attended to by the soldiers.

10 On another occasion, the witness was taken to a room where
her nephew (then completely without clothes) was beaten by
a black American soldier on his private parts whilst she herself
was beaten by a black American female soldier. As a result of
15 the beating, a broken piece of a plastic chair (used for beating)
had embedded in her feet. She was told that they would
continue to be beaten until she and her nephew confessed.

20 The witness said that her nephew was kept naked and later
taken to Abu Gharib in the same condition. The witness also
testified that she was later taken to Abu Gharib, where she
was given a wrist band with a number. A hood was put on
her head. She was later examined by a doctor who said that
she was injured and needed urgent attention. However, her
25 interrogators refused to give her the needed medical
treatment.

She also testified that she was not given proper clothing, nor
given medical treatment for her injured feet. She was in Abu
30 Gharib prison for about 6 months. She was released on June
22, 2004.

35 The witness stated that as a result of the beatings and cruel
treatment when she was detained, she is now unable to move
her left leg freely; her left arm is also similarly affected. She is
still unable to wear shoes because of her old injuries. She
cannot endure cold climate. Her injuries to her lower back
need further medical treatment but she is unable to afford the
cost of surgery.

Two statutory declarations of absent witnesses

1

After the three witnesses had given their evidence, the prosecution tendered two statutory declarations – the first by Ali Sh. Abbas (45 years old, currently living in Jordan) and the second by Rhuheh Ahmed (27 years old, currently living in Sandwell, England).

5

Ali Sh. Abbas deposed in his statutory declaration that he was on his way to the mosque in Al-Amraya on October 13, 2003 when he was arrested by American soldiers. His hands were tied at the back and a hood was placed over his head and he was taken to a small prison in a US military camp in Al-Amraya. He was told by one Captain Philips that he had received orders to arrest him but he did not know the reasons for the arrest. Two days later, he was moved to Abu Gharib prison when he was interrogated and a most cruel and degrading treatment was meted out to him.

10

15

The deponent stated that his interrogators wore civilian clothes, whilst the translator, an Afro-American, wore American army uniform.

20

The deponent further stated that on one occasion, the interrogators forcibly placed him on top of a carton box containing canned food. They then connected electric wires to his fingers and ordered him to stretch out his hands horizontally; then they switched on the electric power. The deponent said that he was tortured in such manner on three separate sessions. Throughout this torture session, the interrogators took photographs.

25

30

The deponent said that he was released in early March 2004.

In the second statutory declaration, the deponent said that he was detained from the end of 2001 until March 2004. He was 18 years old when he was detained. He was detained and tortured in Kandahar and later Guantanamo Bay. He was shackled, placed in solitary confinement, forced to take injections every 6 months (resulting in hallucinations), hooded and handcuffed and subjected to intense interrogations for 5 months from the middle of 2003.

35

40

Cross-examination by *Amicus Curiae*

The prosecution's three witnesses were cross-examined by the *Amicus Curiae* as provided for under Article 20 of Chapter V (Mode of Proceedings) of Part 2 (Rules of Procedure and Evidence of the Tribunal). At the close of the cross-examination by the *Amicus Curiae*, the witnesses were re-examined by the Chief Prosecutor.

Submission on statutory declaration by absent witnesses

Both sides, the prosecution and *Amicus Curiae* on behalf of the 8 Accused persons, submitted that the statutory declarations by the two absent witnesses are admissible pursuant to Article 24 of Chapter V of Part 2 of the Charter but they leave it to the Tribunal to decide finally on the total weight of such evidence.

Summary of witness's testimony

The prosecution submitted that the testimony of the three witnesses (corroborated by the statutory declaration of the two absent witnesses) clearly show a sustained and prolonged infliction of cruel and dehumanizing course of conduct on the part of those perpetrators. The evidence adduced before the Tribunal clearly establishes the fact that the victims were subjected to severe and mental pain as a result of extreme interrogating techniques that were applied to them cumulatively and over long periods.

The prosecution also submitted that the evidence clearly shows that the American military and other personnel were involved in the arrest, abduction and torture of these witnesses. The United States was at all material times the occupying belligerent power in Afghanistan and Iraq (where these atrocities on the witnesses were carried out) and they have an obligation under the Geneva Conventions to ensure that no such acts are inflicted on these persons who are under the law "*protected persons*".

The evidence also clearly shows that the witnesses in the instant case were taken prisoners in respect of the Afghanistan

war as well as the Iraq war. They were held in prisons in Afghanistan (Bagram) as well as in Iraq (Baghdad International Airport and Abu Ghraib). Two witnesses in this case, Moazzam Begg and Rhuhel, were transported and detained in Guantanamo Bay.

Issues before the Tribunal

There are three issues for the determination of the Tribunal in the instant case –

- (1) Whether the acts perpetrated against the witnesses amount to torture under the Torture Convention Act 1984;
- (2) Whether the cruel, inhumane and degrading treatment meted out to the witnesses in their place of detention was in violation of Geneva Convention III and IV, 1949, and the Common Article III to the Geneva Conventions; and
- (3) Who is liable for the acts of torture and the cruel, inhumane and degrading treatment meted out to the witnesses in this case?

Each of these issues is considered separately as stated below.

Whether the acts amounted to torture under the Torture Convention Act?

“Torture” is defined in the Torture Convention as *“the intentional infliction of severe pain or suffering, whether physical or mental, by or with the consent or acquiescence of a public official”*. The term *“public official”* includes the Head of a State.

In the Pinochet case (No. 3) [1999] 2 WLR 827, at p. 886D, the House of Lords held that the prohibition against torture is absolute. There can be no derogation from this rule, which has been long accepted as *jus cogens* – a peremptory norm of international law from which states cannot derogate.

1 Under Article 3 of the UN Declaration on the Protection of
All Persons from being subjected to Torture and other Cruel,
Inhumane and Degrading Treatment or Punishment of
December 9, 1975, it is stated that not even exceptional
5 circumstances can excuse torture – such as war on terror or
public emergency.

The Torture Convention has been subscribed by 133 states.
The United States is a party to the Convention, having
10 implemented it through the passage of a domestic law, namely
sections 2240-2340A of Title 18 of the United States Code.

In the aforesaid Pinochet case, the House of Lords said that
the Torture Convention was agreed not to create an
15 international crime which had not previously existed but *“to
provide an international system under which the international
criminal – the torturer – would find no safe haven”*.

Unlike the crime against humanity, which requires the act as
20 part of a widespread or systematic attack against civilians as
a measure of state policy, even a single act of official torture
is a crime under the Torture Convention.

According to the UN Committee against Torture, which is
25 the UN body of independent experts that implements the
Convention Against Torture, the following interrogation
techniques constitute torture – namely, restraining in very
painful conditions, hooding under special conditions,
30 sounding of loud music for prolonged periods, sleep
deprivation for long periods, threats including death threats,
violent shaking and extreme temperatures. The Committee
therefore has clearly shown that the interrogation techniques
authorised by the Department of Defence (as had been meted
out to the witnesses in the instant case) amount to *“torture”*
35 within the meaning of Article 1 of the Torture Convention.

The same UN Committee had also declared that the use of
techniques such as shackling, the use of dogs and internal
40 examinations constitute torture or cruel, inhumane or
degrading treatment.

The International Committee of the Red Cross (ICRC), in its Report of February 2004 stated that the construction of the Guantanamo system, whose objective is to extract intelligence information *"cannot be considered other than an international system of cruel, unusual and degrading treatment and a form of torture"*. 1 5

Whether the acts were in violation of the Geneva Conventions?

The four Geneva Conventions were created in 1949 after World War II, setting out minimum standards that everyone must comply. Each of these 4 Conventions has three common articles, namely – 10

Article 1 – respect for the Convention *"in all circumstances"*; 15

Article 2 – applying the Convention not only to declared wars but also to *"any other armed conflict"*;

Article 3 – prescribes a minimum of humane treatment in *"armed conflict not of an international character"* to all civilians and non-combatants. 20

These three Common Articles reflect international customary law. In *Hamdan v Rumsfeld* (2006) 548 US 557, the United States Supreme Court had clearly stated that the Common Articles must be interpreted *"as widely as possible"*. Consequently the court held that the three Common Articles apply to the detainees at Guantanamo Bay. 25

Geneva Convention III protects all persons, whether they are captured or they surrendered, whether they are in uniform or not, and even if they do not take any part in the hostilities. In the instant case, the witnesses (victims) were abducted from the battlefields in Afghanistan and Iraq, as well as from other places (Pakistan) and then handed to the authorities in Afghanistan and Iraq. 30 35

Even if there is any doubt as to the status of any person detained, Article 5 of Geneva Convention III provides that such person *"shall enjoy the protection of the Convention until"* 40

1 *such time*" as the person's status has been determined by a
competent tribunal.

5 The evidence in this case clearly shows that the legal opinions
and the advice given by the 4th to the 8th Accused persons to
the first, second and third Accused persons (in that the Geneva
Conventions were "*obsolete*", they can be ignored, that Taliban
militia are not protected, Articles 3 and 5 of Geneva
Convention III may be violated) were, as submitted by the
10 prosecution, "*legally flawed*".

15 It is significant here to note that some years later, after the
occurrence of these events inflicted on the witnesses, in
January 2009 President Barack Obama had issued an Executive
Order 13491 directing that when conducting investigations,
no government official, employee or agent can rely any more
on "*any interpretation of the law governing interrogations*" issued
by the Department of Justice under the Bush administration.

20 Who is liable for the acts of torture, cruel, inhumane and
degrading treatment?

25 If it is proven that an act of torture or cruel, inhumane and
degrading treatment had been perpetrated against a victim
by a particular individual, then that individual is personally
liable under the Torture Convention and the Geneva
Conventions as well.

30 In the case before the Tribunal, the 8 Accused persons are not
the individuals who actually committed these tortures or
inflicted the cruel, inhumane and degrading treatment against
the witnesses (victims) but their superiors. The question for
the Tribunal to decide is therefore whether the 8 Accused
persons can be made liable for the acts of their subordinates?

35 **Finding a *prima facie* case**

40 At the close of its case, the prosecution submitted that it has
"*proved beyond reasonable doubt*" (sic) that all the 8 Accused
persons were instrumental in inflicting torture and cruel,
inhumane and degrading treatment against the witnesses
(victims) that violated the Torture Convention as well as

Geneva Convention III. The prosecution further submitted that the 4th to 8th Accused persons, as legal counsel advising the administration, had played a decisive role in subverting the system of international rules that should have protected all the detainees.

In response, the *Amicus Curiae* for the 8 Accused persons submitted that the torture of Abbas Abid (the first witness) has not been proven to be linked to the Americans in any way by the prosecution.

In regard to the second witness (Moazzam Begg), the *Amicus Curiae* said that during cross-examination, it was discovered that Moazzam owned a bookstore, and had spent time at a training camp in Afghanistan. Why were these facts not disclosed in his statutory declaration?

In regard to the third witness (Jameelah), the *Amicus Curiae* submitted that *"We have no proof that she was detained at an American facility"*. He further submitted that her identification of her torturers as Americans *"is also based on conjecture"* from the assumption that since she was in the American part of Iraq, she was therefore assaulted by American nationals. This remains merely an assumption, and there is no actual identification, he submitted.

Turning his attention to points of law, the *Amicus Curiae* said that *"customary international law and jus cogens are like the snake-oil of international law"*. He submitted that *"international law really boils down to treaties"*, so forget *jus cogens*, and forget customary international law. States are only bound by treaties which they have signed or ratified.

The *Amicus Curiae* further submitted that *"War is like a black hole"*. After 9/11, after the war on terror, under the international law now, *"Torture is OK"*, because the world has changed, international law has changed.

Proving a *prima facie* case, compels the conclusion sought to be proven, unless evidence sufficient to rebut the conclusion is produced. The *Amicus Curiae* made no attempt to do so. This is clearly fatal omission on his part. In a case of trial by

1 Jury, the burden falls on the Jurors to then decide whether
the case against the accused has been proven beyond
reasonable doubt see *Commonwealth v. Pauley*, 368 Mass. at
291-292, 331 N.E.2d at 904-906; *Commonwealth v. Crosscup*,
5 369 Mass. 228, 239-240, 339 N.E.2d 731, 738-739 (1975);
Commonwealth v. Leinbach, 29 Mass. App. Ct. 943, 944, 558
N.E.2d 1003 (1990). In our present case, however, we have
sufficient judicial precedents to conclude that an un rebutted
finding of prima facie case amounts to proof beyond
10 reasonable doubt see *PP v. Sidek* [Criminal Trial no: 47-5-1999]
31 January 2005.

In its rebuttal of the submission by the *Amicus Curiae*, the
prosecution said that the reasoning by the *Amicus* is "so faulty
15 at its core" that it should be rejected. In any case, the
prosecution pointed out that the United States is a party to
the Torture Convention as well as to the Geneva Conventions.

The prosecution then submitted that in presenting its case to
the Tribunal it had described specific acts of breaching the
20 Geneva Convention committed by the 8 Accused Persons but
the defence had not responded to them. Neither had the
defence responded to many other matters raised in the
prosecution's case.

25 Rebutting the *Amicus Curiae's* contention that after 9/11
"Torture is OK", the prosecution reiterated that even after 9/
11 "the prohibition of torture remains absolute". The prosecution
stated that the defence can mock international customary law,
30 but that is not the way the United States Supreme Court sees
it. In the Hamdan case, the court held that the Common Article
3 of the Geneva Convention apply to Taliban and Al-Qaeda.

35 The prosecution also submitted in rebuttal that the stand taken
by the Pentagon is that the laws of war "have not changed"
since 9/11. The Pentagon has been consistent in its stand in
this matter.

40 Having considered all the evidence adduced by the
prosecution and the submissions put forward by both the
prosecution and the defence, the Tribunal unanimously finds

that a *prima facie* case has been proved and the *Amicus Curiae* is invited to present its case for the 8 Accused persons. 1

The defence case 5

Upon being invited by the Tribunal to present the defence's case after its finding that a *prima facie* case has been made out by the prosecution, the *Amicus Curiae* informed the Tribunal that he has no more submission to make. His early submission in response to the prosecution's case was his "*final submission*" on the matter. 10

The prosecution likewise informs the Tribunal that it has no intention to make any further submission, in the light of the stand taken by the *Amicus Curiae*. In the light of these statements by both the prosecution and the defence, the Tribunal adjourns the hearing, reserving its verdict – to be delivered on the following day (on 11 May, 2012). 15

Torture and War Crimes 20

After considering the defence case, the Tribunal finds that the prosecution established beyond a reasonable doubt that the Accused persons: 25

- U.S. President George W. Bush and his co-conspirators
- Richard B. Cheney, former U.S. Vice President
- Donald H. Rumsfeld, former Defence Secretary
- Alberto Gonzales, then Counsel to President Bush
- David Addington, then General Counsel to the Vice-President 30
- William Haynes II, then General Counsel to Secretary of Defense
- Jay Bybee, then Assistant Attorney-General
- John Choon Yoo, former Deputy Assistant Attorney-General 35

engaged in a web of instructions, memos, directives, legal advice and action that established a common plan and purpose, joint enterprise and/or conspiracy to commit the crimes of Torture and War Crimes, including and not limited to a common plan and purpose to commit the following crimes 40

1 in relation to the “War on Terror” and the wars launched by
the U.S. and others in Afghanistan and Iraq:

- 5 (a) Torture;
- (b) Creating, authorizing and implementing a regime
of Cruel, Inhumane, and Degrading Treatment;
- (c) Violating Customary International Law;
- (d) Violating the Convention Against Torture 1984;
- (e) Violating the Geneva Convention III and IV 1949;
- 10 (f) Violating the Common Article 3 of the Geneva
Convention of 1949.
- (g) Violating the Universal Declaration of Human
Rights and the United Nations Charter.

15 **Joint and Individual Criminal Liability**

The Tribunal finds that the prosecution has established
beyond a reasonable doubt that the Accused persons are
individually and jointly liable for all crimes committed in
20 pursuit of their common plan and purpose under principles
established by Article 6 of the Charter of the International
Military Tribunal (the Nuremberg Charter), which states, inter
alia, “Leaders, organizers, instigators and accomplices
participating in the formulation or execution of a common
25 plan or conspiracy to commit war crimes are responsible for
all acts performed by any person in execution of such plan.”

The Principles of the Nuremberg Charter and the Nuremberg
Decision have been adopted as customary international law
30 by the United Nations. The government of the United States
is subject to customary international law and to the Principles
of the Nuremberg Charter and the Nuremberg Decision.

Complainant War Crime Victims

35 The Tribunal finds that the prosecution has established
beyond a reasonable doubt that the Accused persons have
committed the crimes set out in paragraph 9 hereof, including
but not limited to Torture and Cruel, Inhumane, and
40 Degrading Treatment, against the following Complainant War
Crime Victims who appeared before this Tribunal by statutory
declaration and/or in person under oath:

- | | | |
|-----|-----------------------------------|---|
| (a) | Abbas Abid; | 1 |
| (b) | Moazzam Begg; | |
| (c) | Jameelah Abbas Hameedi; | |
| (d) | Ali Sh. Abbas (Alias Ali Shalal); | |
| (e) | Rhuhel Ahmed. | 5 |

Each of these Complainant War Crime Victims is a civilian, who was released without charge after extended periods of time, after being subjected to Torture and Cruel, Inhumane, and Degrading Treatment for which the Accused persons are criminally liable. 10

Irreparable harm and injury, pain and suffering

The Tribunal finds that the prosecution has established beyond a reasonable doubt that each of the Complainant War Crime Victims has suffered irreparable harm and injury, and pain and suffering due to the criminal acts of the Accused persons, as set out in their respective sworn testimony and statutory declarations presented at the Trial. 15 20

Absolute prohibition on Torture and Cruel, Inhumane and Degrading Treatment

The Tribunal finds there is an absolute prohibition on Torture and on Cruel, Inhumane and Degrading Treatment in international law and in the relevant laws and regulations of the United States of America and of the U.S. Army (including Army Field Manual 27-10), all of which were violated by the Accused persons. As stated by Prof. Jordan J. Paust in *"The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions,"* Valparaiso Law Review, Vol. 43, Number 4, Summer 2009, *"Torture is a form of treatment of human beings that is absolutely prohibited under various forms of customary and treaty-based international law in all social contexts. Other forms of treatment that are absolutely prohibited and often proscribed in the same international instruments that outlaw torture include prohibitions of cruel, inhuman, and degrading treatment."* 25 30 35

The Tribunal finds that the prosecution has marshalled a substantive and powerful array of international and United States legal precedents to support this view. By contrast, 40

1 counsel for the Accused, as *Amicus Curiae*, has tendered no
legal authority to support his view that “After 9/11, torture is
OK”. Nor has the *amicus curiae* offered any substantial legal
precedent supporting the views taken by the Accused persons
5 in their respective memoranda, executive orders, and
directives, and legal opinions giving rise to their crimes of
Torture and Cruel, Inhumane, and Degrading Treatment.

10 The prosecution has noted that in *Ex-parte Pinochet* (No 3)
[1999] 2 WLR 827 at p. 886 D, English House of Lords, “the
prohibition of torture is absolute, *jus cogens*, and is a
peremptory norm of international law from which states
cannot derogate.” In that case, Lord Hope states that torture
15 by public officials is “*without doubt regarded by customary
international law as an international crime.*” Exceptional
circumstances such as war, instability, public emergency,
cannot excuse torture. Article 3, UN Declaration on the
Protection of All Persons from being subjected to Torture and
20 other Cruel, Inhumane, and Degrading Treatment or
Punishment. 1984 International Convention of the Law of
Torture (the “Torture Convention”)

25 The United States is party to the Torture Convention (2340-
2340A Title 18 USC). As the prosecution has pointed out, the
Torture Convention defines ‘torture’ as ‘the intentional
infliction of severe pain or suffering, whether physical or
mental, by or with the consent or acquiescence of a public
official.’ As established in *Ex-parte Pinochet*, “*The definition
[of Torture in Article 1 of the Torture Convention] is so wide that
30 any act of official torture, so long as it involved severe pain or
suffering, would be covered by it.*”

Exculpatory reasons.

35 The prosecution has established that the exculpatory reasons
by which the Accused persons attempted to shield themselves
from criminal liability for their acts under the Torture
Convention are not valid. A party to the Torture Convention
may not unilaterally redefine what torture means, nor limit
40 its meaning to a specific physiological outcome such as failure
of an organ. The prosecution has established that “*the acts of*

the Accused persons are so grave as to constitute Torture under the Torture Convention”. 1

The prosecution clearly established that the Memorandum by the Attorney General’s office dated Aug. 1, 2002 was legally 5
 flawed in advising that the United States had an
 “understanding” that torture was limited to “*extreme forms of cruel and inhuman treatment*”. The prosecution notes that
 “*reservations to the Convention under Articles 28 and 30 do not extend to the right to redefine torture*”. 10

Violations of the Geneva Conventions

The prosecution has established that the Accused persons have 15
 violated Common Article 3 of the Geneva Conventions with
 respect to the Complainant War Crimes Victims. The U.S. War
 Crimes Act (18 U.S.C. 2441) criminalizes acts outlawed by
 Common Article 3 in the United States. The U.S. Supreme
 Court in *Hamdan v. Rumsfeld* (2006) 548 US 557 applied the
 protections of Common Article 3 to detainees held at the U.S. 20
 base at Guantanamo, Cuba. Relevant parts of Common Article
 3 bind the United States against “(a) *cruel treatment and torture*”
 and “(c) *Outrages upon personal dignity, in particular, humiliating
 and degrading treatment*”. “A regularly constituted court affording
 all the judicial guarantees which are recognized indispensable by 25
 civilized peoples” must precede any sentences. “The wounded and
 sick shall be cared for.”

The prosecution has demonstrated beyond a reasonable doubt
 that “the US Executive branch, as represented by the President, the 30
 Vice-President, and the Defense Secretary [and their respective
 Accused counsel], intended by a conscious and wilful act not to
 treat the prisoners [including the Complainant War Crime Victims]
 in accordance with the Geneva Conventions.” 35

Breaches of the Geneva Conventions

The prosecution has established beyond a reasonable doubt
 that the acts of the Accused persons against the Complainant 40
 War Crime Victims constitute breaches of the Geneva
 Conventions, including but not limited to the following, as
 set out by the prosecution and not refuted by the *amicus curiae*:

- 1 (a) Infliction of cruel treatment in violation of Article 3,
Geneva Convention III, including sleep deprivation;
- 5 (b) Outrages against personal dignity in violation of Article
3, Geneva Convention III, such as enforced nudity for
up to 2 weeks;
- (c) Torture in violation of Article 3, Geneva Convention III;
- 10 (d) Failure to protect prisoners from intimidation in
violation of Article 13, Geneva Convention III;
- (e) Use of weapons against prisoners in violation of Article
42, Geneva Convention III;
- 15 (f) Close confinement in violation of Article 21, Geneva
Convention III;
- 20 (g) Inadequate heating and lighting in violation of Article
25, Geneva Convention III, including severely chilled
interrogation rooms, 24 hour lighting, dark prisons;
- (h) Habitual diet ignored in violation of Article 26, Geneva
Convention III, including forced eating of food against
25 religious norms;
- (i) Causing death of prisoners in violation of Article 3;
Geneva Convention III;
- 30 (j) Mutilation of prisoners in violation of Article 3; Geneva
Convention III;
- (k) Reckless endangerment of health of prisoners in
violation of Article 13, Geneva Convention III, including
35 suggesting suicide to a prisoner;
- (l) Denial of medical care in violation of Article 15, Geneva
Convention III;
- 40 (m) Inadequate nutrition in violation of Article 26, Geneva
Convention III;

-
- | | | |
|-----|---|----|
| (n) | Inadequate recreational opportunities in violation of Article 38, Geneva Convention III; | 1 |
| (o) | Transfer of prisoners to countries practicing torture in violation of Article 20, Geneva Convention III; | 5 |
| (p) | Failure to notify prisoners in advance of transfer in violation of Article 48, Geneva Convention III; | |
| (q) | Failure to allow prisoners to complain about captivity conditions in violation of Article 78, Geneva Convention III; | 10 |
| (r) | Confinement without daylight in violation of Article 48, Geneva Convention III; | 15 |
| (s) | Punishment exceeding 30 days in violation of Article 90, Geneva Convention III; | |
| (t) | Disciplinary punishment without information regarding the offence in violation of Article 96, Geneva Convention III; | 20 |
| (u) | Failure to try prisoners in a regularly constituted court in violation of Article 3, Geneva Convention III; | 25 |
| (v) | Failure to publicly state and inform how prisoners are to be treated in violation of Article 63, Geneva Convention III; | 30 |
| (w) | Failure to transmit legal documents from or to prisoners and denial of visits by lawyers to prisoners in violation of Article 77, Geneva Convention III; | |
| (x) | Failure to put prisoners on trial in impartial tribunals and pronouncing guilt before a trial, leading to the resignation in protest by eight U.S. military attorneys; | 35 |
| (y) | Imposing moral or physical coercion to induce admissions of guilt in violation of Article 99, Geneva Convention III, including informing a Complainant War Crime Victim her daughter would be raped and her son | 40 |

1 imprisoned if she did not confess, and being falsely told
her daughter has been shot;

5 (z) Failure to provide speedy trials in violation of Article
30, Geneva Convention III;

(aa) Gross denial of due process in violation of Article 103,
Geneva Convention III;

10 (bb) Absolving liability for redress of grave breaches under
Article 130 in violation of Article 131, Geneva
Convention III;

15 (cc) Failure to allow prisoners to complain to the United
Nations in violation of Article 78, Geneva Convention
III;

20 (dd) Carrying out experiments to test the level of stress of
human beings in violation of Article 13, Geneva
Convention III;

Accused U.S. President George W. Bush

25 The prosecution has proved beyond a reasonable doubt that
the Accused U.S. President George W. Bush is guilty of war
crimes, as Mr. Bush:

30 "(a) Issued orders [such as a memorandum dated February
7, 2002 declaring al-Qaeda prisoners were outside the
protection of the Geneva Conventions] authorizing treatment
that would constitute a war crime;

"(b) Intended these orders be acted upon;

35 "(c) Had knowledge these orders were indeed acted upon;

40 "(d) Knew that the US was violating the Torture Convention
and the Geneva Conventions and failed to intervene to prevent
these violations." See also *Rasul v. Bush* 2004 No. 03-334
S.C. US, January 14, 2004; *Hamdan v. Rumsfeld* (2006) 548
U.S. 557; *Boumediene v. Bush* 553 US 723 (2008).

Accused Richard B. Cheney, former U.S. Vice President

The prosecution has proved beyond a reasonable doubt that Accused Richard B. Cheney, former U.S. Vice President, “had knowledge of what was going on and in particular that the orders issued by Mr. Bush and Mr. Rumsfeld were issued and acted upon. [Mr. Cheney] was part of the policy makers in this regard. He plainly knew that there were violations of the Torture Convention and/or the Geneva Convention III and failed to intervene to prevent such activity.”

Accused Donald H. Rumsfeld, former Defence Secretary

The prosecution has established beyond a reasonable doubt that Accused Donald H. Rumsfeld, former Defence Secretary has issued Memoranda and Action Memoranda that were central to the common plan and purpose, joint enterprise and/or conspiracy of the Accused persons to commit the crimes Torture and War Crimes. These include, and are not limited to, a Memorandum for the Joint Chiefs of Staff dated 19 January 2002 “approving the ‘advice’ given to him by legal counsel Accused John Yoo and Robert Delabunty dated 9 January 2002 that CIA was free to ignore the Geneva Conventions as they did not apply to suspected al Qaeda and Taliban detainees.”

The prosecution also has established beyond a reasonable doubt that Mr. Rumsfeld was “directly and personally” involved in the development of 18 techniques of enhanced interrogation that are tantamount to torture, and used at Guantanamo, Iraq, and Afghanistan. See also *Rasul v. Bush* 2004 No. 03-334 S.C. US, January 14, 2004; *Hamdan v. Rumsfeld* (2006) 548 U.S. 557; *Boumediene v. Bush* 553 US 723 (2008).

Accused persons Alberto Gonzales, then Counsel to President Bush; David Addington, then General Counsel to the Vice-President; William Haynes II, then General Counsel to Secretary of Defense; Jay Bybee, then Assistant Attorney General; John Choon Yoo, former Deputy Assistant Attorney-General

The prosecution has established beyond a reasonable doubt that the above Accused persons, all lawyers, gave ‘advice’

1 that “the Geneva Conventions did not apply [to suspected al Qaeda
and Taliban detainees]; that there was no torture occurring within
the meaning of the Torture Convention, and that enhanced
5 interrogations techniques, [constituting cruel, inhumane, and
degrading treatment,] were permissible.” This advice was “flawed
legal advice” as determined by Alberto J. Mora, General
Counsel to the U.S. Navy. See also *Hamdan v. Rumsfeld* (2006)
548 U.S. 557.

10 The prosecution has established beyond a reasonable doubt
that the Accused lawyers “knew full well their advice was being
sought to be acted upon, and in fact was acted upon, and such advice
paved the way for violations of international law, the Geneva
Conventions and the Torture Convention.”

15 The Accused lawyers’ advice was binding on the Accused
Bush, Rumsfeld and Cheney, each of whom relied on the
Accused lawyers’ advice. Others, such as CIA Director George
Tenet and Diane Beaver, officer in charge at Guantanamo,
20 relied on the Accused lawyers’ advice. The Accused lawyers
came to the U.S. base at Guantanamo, Cuba before the list of
enhanced interrogation techniques was compiled.

25 The prosecution had established beyond a reasonable doubt
that the Accused lawyers are criminally liable for their acts,
and for participating in a joint criminal enterprise. “Legal
advisors who prepare legal advice that is so erroneous as to give rise
to an international crime are themselves subject to the rules of
30 international criminality.” See *Alstotter case; Prosecutor v Tadic*,
Case No. IT-94-1-A Appeal Judgment, 15 July 1999 [*Tadic*
Appeal Judgment]; *Prosecutor v. Krnojeac*, Trial Chamber,
March 15, 2002.

35 The verdict

After considering the evidence adduced by the prosecution
and submissions by both the prosecution and the *Amicus*
Curiae on behalf of the 8 Accused persons, the Tribunal is
satisfied, beyond reasonable doubt, that all the 8 Accused
40 persons are guilty as charged.

The Tribunal finds the Accused persons:	1
<ul style="list-style-type: none"> • U.S. President George W. Bush and his co-conspirators • Richard B. Cheney, former U.S. Vice President • Donald H. Rumsfeld, former Defence Secretary • Alberto Gonzales, then Counsel to President Bush • David Addington, then General Counsel to the Vice-President • William Haynes II, then General Counsel to Secretary of Defense • Jay Bybee, then Assistant Attorney General • John Choon Yoo, former Deputy Assistant Attorney-General 	5
guilty as charged and convicted as war criminals for Torture and Cruel, Inhumane and Degrading Treatment of the Complainant War Crime Victims.	15
Reparations	20
The Tribunal orders that reparations commensurate with the irreparable harm and injury, pain and suffering undergone by the Complainant War Crime Victims be paid to the Complainant War Crime Victims. While it is constantly mindful of its stature as merely a tribunal of conscience with no real power of enforcement, this Tribunal finds that the witnesses in this case (being victims placed in detention illegally by the 8 convicted persons) are entitled <i>ex justitia</i> to the payment of reparations by the 8 convicted persons and their government.	25
It is the Tribunal's hope that armed with the Findings of this Tribunal, the witnesses (victims in this case) will, in the near future, find a state or an international judicial entity able and willing to exercise jurisdiction and to enforce the verdict of this Tribunal against the 8 convicted persons and their government. The Tribunal's award of reparations shall be submitted to the War Crimes Commission to facilitate the determination and collection of reparations by the Complainant War Crime Victims.	30
	35
	40

1 International Criminal Court, United Nations, Security
Council – As a tribunal of conscience, the Tribunal is fully
aware that its verdict is merely declaratory in nature. We have
5 no power of enforcement, no power to impose any custodial
sentence on any one or more of the 8 convicted persons.

What we can do, under Article 31 of Chapter VI of Part 2 of
the Charter is to recommend to the Kuala Lumpur War Crimes
Commission, which we HEREBY DO, to submit this finding
0 of conviction by the Tribunal, together with a record of these
proceedings, to the Chief Prosecutor of the International
Criminal Court, as well as the United Nations and the Security
Council.

5 Commission's Register of War Criminals – Further, under
Article 32 of the same Chapter, this Tribunal recommends to
the Kuala Lumpur War Crimes Commission that the names
of all the 8 convicted persons herein be entered and included
0 in the Commission's Register of War Criminals and be
publicized accordingly.

The Tribunal recommends to the War Crimes Commission to
give the widest international publicity to this conviction and
grant of reparations, as these are universal crimes for which
5 there is a responsibility upon nations to institute prosecutions
if any of these Accused persons may enter their jurisdictions.

Before we end these proceedings, the Tribunal wishes to place
on record its appreciation to counsel in both the prosecution
7 team and the defence team for their diligence and dedication
in the conduct of this most difficult case in the realm of public
international law.

Registrar Musa Ismail:

5 Your Honour, by this, and from this moment onwards, all the
accused persons, as charged, shall be recorded in the War
Crimes Register, and their names shall be accordingly
published.

7 All rise.

***** END *****

